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IN THE

Supreme Court of the United States

October Term 1965

NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General for the
United States, *Defendant*

MOTION FOR LEAVE TO FILE COMPLAINT

The State of South Carolina, by its Attorney General and its special counsel, asks leave of the Court to file its Complaint against Nicholas deB. Katzenbach, Attorney General of the United States submitted herewith, for the reasons stated therein and in the attached supporting brief.

DANIEL R. MCLEOD
Attorney General
State of South Carolina
DAVID W. ROBINSON
DAVID W. ROBINSON, II
Special Counsel

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NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

COMPLAINT

The State of South Carolina, by its Attorney General, brings this action in equity against the defendant and for its cause of action states:

1. That the Plaintiff is a Sovereign State of the United States of America, was one of its founders and was an original party to the compact of Sovereign States known as the Constitution of the United States.

2. That the defendant is a resident and citizen of a State other than the Plaintiff and is presently serving as the Attorney General of the United States.

3. That the jurisdiction of this Court is invoked under Article III, §2, Clause 1 & 2 of the Constitution of the United States.

4. That as a part of her sovereign responsibility, the Plaintiff is charged with maintaining and preserving a representative government for her inhabitants, including

fair and reasonable election procedures and qualifications and prerequisites for the registration and voting of her citizens in the selection of their governmental officials and the resolution of major governmental issues, in the interest of better government for her inhabitants, all as confirmed and charged by her Constitution and laws and those of the United States of America.

5. That, as recognized and expressly provided by the Constitution of the United States, it is within the peculiar and special and exclusive province of the Plaintiff to prescribe and maintain reasonable and lawful registration and voting procedures, in the interest of the most qualified electorate to achieve the fairest and most capable government and governing officials for her inhabitants. That in this capacity the Plaintiff is *parens patriae* of her citizens as to *all* sovereigns to prevent the destruction or diiution of these processes by unconstitutional and unlawful means, federal or otherwise.

6. That, purporting to act under authority of the Fifteenth Amendment of the Constitution of the United States, the Congress of the United States enacted, and the President of the United States approved, on August 6, 1965 the "Voting Rights Act of 1965", Public Law 89-110, 89th Congress, S-1564, (hereinafter referred to as the "Act") which attempted to restrict and limit the powers of the Plaintiff and certain other Sovereign States. That in enacting and ratifying this Act, the Congress and the President of the United States specifically recognized and charged that the functions of regulating, maintaining and preserving reasonable voting and registration procedures fell within the particular and special province of the Sovereign States and that the Sovereign States as such had a justiciable interest in all questions arising under said Act or resulting from its enactment, falling within the area of voting and registration of their citizenry.

7. That this Court has recently recognized and established, in litigation involving other Sovereign States, that

the Plaintiff is charged with the duty and function of preserving to her inhabitants their right to participate in her governmental affairs and those of the United States government under an election system designed to insure equal and fair participation by her electorate, as constitutionally and lawfully determined; and that the Plaintiff, as a Sovereign State, is further charged with the prevention of any dilution or discrimination in the fair or equal participation of said electorate under its election system by any unconstitutional and unlawful means. That the Congress, under the Fifth Amendment of the Constitution of the United States, is constitutionally without power to enact legislation having the effect of diluting and weakening the weight or value of the vote of her constitutionally selected electorate, which this Court has recently specifically prohibited the Sovereign States from doing under the Fourteenth Amendment to the Constitution of the United States.

8. That this action is brought by the Plaintiff as a Sovereign State in her quasi-sovereign capacity to preserve to her inhabitants the most capable and just representative government through her election procedures; as a Sovereign *parens patriae* to preserve and maintain fair and reasonable registration and voter qualifications and procedures, to insure a qualified electorate and the most capable and just government for her inhabitants and to prevent the dilution of the vote of said electorate; as a Sovereign State charged by the Congress and the Executive Branch of the United States government under the Act with respect to her voting and registration procedures and whose justiciable interest is therein recognized by the Congress of the United States; and as a Sovereign State directed by this Court to prevent unconstitutional dilution of, or discrimination in, the right of her lawfully qualified electorate to participate in her governmental affairs.

9. That on November 3, 1964 the Plaintiff's inhabitants were registered and voted in the number and percentages shown in Exhibit A. attached hereto and incorporated as a part of this Complaint.

10. That the Act, particularly §§4, 5, 6(b), 11 and 12, arbitrarily, unconstitutionally and unlawfully in the particulars hereinafter set forth, attempts to restrict and prohibit the Plaintiff's right to exercise her sovereign power to prescribe fair and reasonable qualifications for registration of her electorate and the conduct of her elections, federal, state or local, solely because the Plaintiff maintains a fair and lawful literacy test as a prerequisite to the registration of her electorate and because certain of her registered voters failed to vote on November 3, 1964.

11. That, as administered, the Plaintiff's literacy test consists of the reading of a short, simple sentence of her Constitution and the completion by the citizen of an application form, a copy of which is attached hereto as Exhibit B and incorporated as a part of this Complaint.

12. That, in addition to her lawful and constitutional literacy test, the Plaintiff's Constitution and laws contain the following prerequisites to registration and voting, all of which materially affected the number and percentage of Plaintiff's inhabitants who participated in the election of November 3, 1964:

> "Article II, §3—Every male citizen of this State and of the United States 21 years of age and upwards, not laboring under the disabilities named in this Constitution possession the qualifications required by it, shall be an elector."
>
> "Article II, §4—Qualifications for suffrage shall be as follows:
>
> (a) Residence—Residence in the state for one year in the county for six months and in the polling precinct in which the elector offers to vote for three months; provided that ministers in charge of an organized church and teachers of public schools and the spouse of any person shall be entitled to vote after six months residence in the state, otherwise qualified (amended to shorten time in the state from two to one year, in the county from one year to six months and in the

precinct from four months to three months in 1963 See 1963 Stat. 53, p. 109.")

"(b) Registration—Registration, which shall provide for the enrollment of every elector once in ten years, and also an enrollment during each and every year of every elector not previously registered under the provisions of this Article."

"(c) Qualifications for registration up to January, 1898; list of registered voters.—Up to January 1st, 1898, all male persons of voting age applying for registration who can read any section in this Constitution submitted to them by the registration officer, or understand and explain it when read to them by the registration officer, shall be entitled to register and become electors. A separate record of all persons registered before January 1st, 1898, sworn to by the registration officers, shall be filed, one copy with the Clerk of Court and one in the office of the Secretary of State, on or before February 1st, 1898, and such persons shall remain during life qualified electors unless disqualified by the other provisions of this Article. The certificate of the Clerk of Court or Secretary of State shall be sufficient evidence to establish the right of said Citizens to any subsequent registration and the franchise under the limitations herein imposed.

"(d) Qualification for registration after January, 1898.—Any person who shall apply for registraiton after January 1st, 1898, if otherwise qualified, shall be registered; *Provided*, That he can both read and write any Section of this Constitution submitted to him by the registration officer, or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars ($300) or more.

"(e) Payment of taxes necessary for voting.—Eliminated by 1949 (46) 773; 1951 (47) 24.

"(f) Certificate of registration.—The General Assembly shall provide for issuing to each duly registered elector a certificate of registration, and shall provide for the renewal of such certificate when lost, mutilated or destroyed, if the applicant is still a qualified elector under the provisions of this Constitution, or if he has been registered as provided in subsection (c)."

"Article II, §6. Persons disqualified from voting.—The following persons are disqualified from being registered or voting:

First, Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegnation, larceny, or crimes against the election laws: *Provided*, That the pardon of the Governor shall remove such disqualification. Second, Persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison."

See South Carolina Code of Laws, 1962 §23-62.

13. That under her Constitution and laws, Article II, §4(b) of the Constitution of South Carolina and §23-67 of the South Carolina Code of Laws, 1962, Plaintiff's citizens are required to re-register or re-enroll every ten years to be eligible for continued voting, the most recent such re-registration or re-enrollment occurring in 1957, which re-registration or re-enrollment materially affected the number and percentage of Plaintiff's inhabitants who participated in the election of November 3, 1964.

14. That, in her recent history, the Plaintiff's citizens have selected their governmental officers, federal, state and local, in a one-party primary (Democratic) system, with said officials so nominated receiving no substantial opposition in Plaintiff's General Elections, with the result that many of the Plaintiff's citizens had never consistently

participated in her General Elections, which fact materially affected the number and percentage of Plaintiff's citizens who participated in the election of November 3, 1964, all as shown in Exhibits C-1 and 2, attached hereto and incorporated as a part of this Complaint.

15. That, in her recent history, the Plaintiff's inhabitants have maintained an economic level and, as a result, also an educational level substantially below those of the inhabitants of many other Sovereign States, which facts have materially affected the interests of her inhabitants in participating in her governmental affairs through her election procedure and thus materially affected the number and percentage of the Plaintiff's inhabitants who participated in the election of November 3, 1964, all as shown in Exhibits D-1 and 2, attached hereto and incorporated as a part of this Complaint. That the Court will take judicial notice that said economic and educational levels were, in large measure, the direct and proximate result of economic sanctions directed against the Plaintiff and her inhabitants and certain of her sister states and inhabitants in the past century, including as a principal factor, the discriminatory rail freight rate structure which was comparatively recently modified by Interstate Commerce Commission findings and action.

16. That the Act, particularly §§4, 5 and 6(b) arbitrarily and unconstitutionally fails to permit, in the determination of the applicability of its terms, consideration of the facts set forth above affecting the number and percentage of the Plaintiff's inhabitants who registered and voted in the election of November 3, 1964.

17. That all of the reported evidence presented to the Congress during its deliberations on the Act, including the repeated testimony of the Defendant, indicated that the administration of the Plaintiff's lawful literacy test has not, in her recent history, resulted in the systematic denial to any of her inhabitants of the right to vote on account of race, color or previous condition of servitude.

18. That none of the Plaintiff's appropriate governing officials have received any complaint from her inhabitants of any improper administration of her literacy test or its use to deny them the right to vote on account of race, color or previous condition of servitude, all as shown by the affidavits attached hereto as Exhibits E-1, 2 and 3, and incorporated as a part of this Complaint.

19. That the Plaintiff alleges in the language of the Act, that neither the Plaintiff nor her political subdivisions "... have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color..."; that any "... incidents of such use have been few in number and have been promptly and effectively corrected by State or local action..."; that "... the continuing effect of such incidents has been eliminated..."; and "... there is no reasonable probability of their recurrence in the future"; but that they are conclusively taken as having done so solely on the basis of artificial and irrebuttable presumption contained in the Act, the validity of which is challenged in this suit.

20. That on or before August 8, 1965 the Defendant sought to invoke the provisions of the Act with respect to Plaintiff, her political subdivisions, officials and inhabitants and to certain other Sovereign States and political subdivisions of other Sovereign States, as shown by the letter of an Assistant Attorney General dated August 8, 1965 and some enclosures, all of which are attached hereto and incorporated as a part of this Complaint as Exhibits F 1, 2 & 3.

21. That in addition to the Sovereign States and political subdivisions listed in Exhibit F 3, attached, the following subdivisions maintained literacy tests on November 1, 1964 and failed to vote 50% of their citizens over 21 years of age on November 3, 1964:

Elmore County, Idaho
Aroostook County, Maine

That no attempt has been made by the United States to invoke and apply the Act, particularly §§4, 5 and 6(b), as to these subdivisions.

22. That the Act, particularly §§4, 5 and 6(b) unconstitutionally violates the principles of Equality of Statehood, as embedded in the Constitution of the United States of America and reflected in the Fifth and Fourteenth Amendments to said Constitution, both as drawn and applied to the Plaintiff, her political subdivisions, officials and inhabitants, in the following particulars:

(a) By limiting the application of certain of its restrictions and prohibitions solely to States and political subdivisions voting its inhabitants below certain percentage quotas on November 3, 1964, the Act is effectively drawn so as to apply solely to the Plaintiff, her political subdivisions, officials and residents, and certain other Sovereign States, their political subdivisions, officials and residents, as if specifically named therein, rather than to all the Sovereign States of the Union, their political subdivisions, officials and citizens.

(b) The Act deprives the Plaintiff, her political subdivisions, officials and residents of the right to prescribe, as a qualification for the registration of her inhabitants for voting, fair, reasonable, lawful and constitutional literacy tests, but permits the right to certain other Sovereign States similarly situated.

(c) The Act deprives the Plaintiff, her political subdivisions, officials and residents of the right to amend or change its Constitution and laws, customs, standards, practices and procedures with respect to the voting and voter qualifications of her residents, and elections and voter registration in general, without first obtaining Federal approval, but permits that right to certain other Sovereign States, their political subdivisions, officials and inhabitants similarly situated.

(d) The Act applies to all of the Plaintiff's political subdivisions, even though some exceeded the registration

and voting percentage quotas provided in the Act, but fails to so apply to certain subdivisions of other states similarly situated.

(e) The Act has been applied to Plaintiff, her political subdivisions, officials and citizens and to certain other Sovereign States, their political subdivisions, officials and inhabitants, but not to certain subdivisions, officials and citizens of other Sovereign States covered by its terms and similarly situated.

(f) The Act presumes wrongful conduct in violation of the Fifteenth Amendment of the Constitution of the United States of America on the part of the Plaintiff, her political subdivisions, officials and citizens because of her inhabitants' record of voting on November 3, 1964, but fails to prescribe a like presumption for certain other Sovereign States, and political subdivisions with similar voting records.

(g) The Act deprives the Plaintiff, her political subdivisions, officials and citizens of the right to resort to her courts and those of the United States of America within her territories to determine the rights of her citizens to register and vote in federal, state and local elections, but permits said right to other Sovereign States and political subdivisions similarly situated.

(h) The Act creates an irrebuttable presumption that the Plaintiff, her political subdivisions, officials and inhabitants were guilty of the denial or abridgment of her citizens' right to vote on November 3, 1964 on account of race, color or previous condition of servitude and deprives the Plaintiff, her political subdivisions, officials and inhabitants of the right and opportunity to deny and disprove the accuracy and validity of said presumption, and fails to create a similar irrebuttable presumption with respect to certain other Sovereign States and their political subdivisions similarly situated.

(i) The Act grants to certain of the Plaintiff's inhabitants the right to register and vote in violation of her

Constitution and voting laws and fails to grant such a right to inhabitants in like circumstances of certain other Sovereign States similarly situated.

23. The Act, particularly §§4, 5, 6(b), 11 and 12, both as drawn and applied to the Plaintiff, her political subdivisions, officials and residents, unconstitutionally and unlawfully invades, restricts and abrogates the exclusive rights and duties of the Plaintiff and her political subdivisions to regulate and prescribe reasonable qualifications for its residents to vote, in the interest of better state, local and federal government, all as reserved to the Plaintiff under the Tenth Amendment to the Constitution of the United States of America as specifically reaffirmed by Article I, §§2 and 4, and the Seventeenth Amendment of said Constitution, in the following particulars, to wit:

(a) The Act deprives the Plaintiff, her political subdivisions, officials and residents of their right to prescribe a reasonable, lawful and constitutional literacy test, fairly and equally administered, as a prerequisite to registration and participation in their elections and those of the United States of America.

(b) The Act grants to certain of Plaintiff's inhabitants the right to register and vote in all elections, federal, state and local, in violation of Plaintiff's Constitution and laws.

(c) The Act authorizes employees, agents and servants of the Federal government to register and vote the Plaintiff's inhabitants in violation of her Constitution and laws.

(d) The Act purports to regulate the manner and conduct of elections of the Plaintiff and her political subdivisions and the preservation of such election records.

(e) The Act denies the Plaintiff, her political subdivisions and inhabitants of the right to enact changes in her existing registration and election laws or to adopt new such laws without Federal approval.

24. That the Act, particularly §§4, 5, 6(b), 11 and 12, both as drawn and applied to the Plaintiff, her political subdivisions, officials and inhabitants, exceeds the Consti-

tutional authority granted to the Congress of the United States under the Fifteenth Amendment to the Constitution of he United States of America to enforce its provisions, the purpose for which the Act was enacted, in the following particulars, to wit:

(a) The Act is not "appropriate" in that the basis and reason for its application to the Plaintiff, her political subdivisions, officials and inhabitants—to wit, the failure of her registered citizens to vote in certain numbers on November 3, 1964 has no relation to any denial or abridgment of the Plaintiff's inhabitants' right to vote on account of race, color or previous condition of servitude.

(b) The Act is not "appropriate" in that it effectively creates an irrebuttable presumption that the Plaintiff, her political subdivisions, officials and inhabitants were guilty of the denial or abridgment of their residents' right to vote on November 3, 1964 on the basis of race, color or previous condition of servitude and deprives the Plaintiff, her political subdivisions, officials and inhabitants of the right and opportunity to deny and disprove the accuracy and validity of said presumption.

(c) The Act is not "appropriate" in that the Act grants the Plaintiff's inhabitants the right to register and vote in violation of her Constitution and laws even though they have not been denied or deprived of the right to vote on the ground of race, color or previous condition of servitude.

(d) The Act is not "appropriate" in that it deprives the Plaintiff, her political subdivisions, officials and inhabitants of their right to a reasonably literate electorate, as guaranteed by Plaintiff's Constitution and laws, even though there has been no denial of her residents' right to vote on account of race, color or previous condition of servitude.

(e) The Act is not "appropriate" in that it is not reasonably designed to prohibit the denial of the right to vote on the grounds of race, color or previous condition of servitude of all the citizens of all the Sovereign States of the Union.

(f) The Act is not "appropriate" in that it undertakes to regulate and make criminal wrongful conduct in connection with voter registration and elections unrelated to the denial of the right to vote on account of race, color or previous condition of servitude.

25. That the Act, particularly §§4, 5 and 6(b) both as drawn and applied to the Plaintiff, her political subdivisions, officials and citizens, constitutes an unlawful and unconstitutional attempt by the Congress of the United States to exercise judicial functions not authorized by Article I of the Constitution of the United States of America in violation of Article III of the Constitution of the United States of America in that it arbitrarily assumes, from unrelated facts, that the Plaintiff, her political subdivisions, officials and inhabitants were guilty of a denial of her inhabitants' right to vote on the ground of race, color or previous condition of servitude on November 3, 1964 and prohibits the Plaintiff, her political subdivisions, officials and inhabitants from proving, in any constitutional court, the validity or accuracy of said presumption.

26. That the Act, particularly §§4, 5 and 6(b), as drawn and applied to the Plaintiff, her political subdivisions, officials and inhabitants, constitutes an unlawful and unconstitutional Bill of Attainder and *ex post facto* law within the meaning of Article I, §9 of the Constitution of the United States in that it deprives the Plaintiff, her political subdivisions, officials and inhabitants of the right to prescribe reasonable qualifications for its voters, including a fair, reasonable and lawful literacy test as a prerequisite to voter registration, solely because the Plaintiff and her political subdivisions, officials and residents failed to vote a certain percentage quota of their inhabitants on November 3, 1964, which failure was proper, constitutional and lawful on November 3, 1964, but which failure is now irrebuttably presumed to be the result of a denial of the rights of her inhabitants guaranteed under the Fifteenth Amendment.

27. That the Act, particularly §§4, 5 and 6(b), both as drawn and applied to the Plaintiff, her political subdivisions, officials and inhabitants, violates the provisions of Article IV, §2 of the Constitution of the United States of America in that it denies the Plaintiff's inhabitants the right to have a reasonably literate electorate in the interest of better government, state, local anad federal, a right permitted by Congress and the Constitution to citizens of other Sovereign States similarly situated.

WHEREFORE, Plaintiff prays:

1. That a decree be entered judging the Act, particularly §§4, 5, 6(b), 11 and 12 in violation of the Constitution of the United States as drawn and applied to the Plaintiff, her political subdivisions, officials and inhabitants.

2. That a decree be entered permanently enjoining and prohibiting the Defendant from enforcing or attempting to enforce the Act, particularly §§4, 5, 6(b), 11 and 12 with respect to the Plaintiff, her political subdivisions, officials and inhabitants.

3. For such other and further relief as this Court may deem proper and necessary.

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September, 1965

EXHIBIT A

GENERAL ELECTION
November 3, 1964

	[a] Over 21 (1960 Census)	[b] Registered 1964	% Registered Over 21	[b] Voted	% Voted of Over 21	% Voted of Registered	[c] % Illiterate Over 25	[d] % Pop. Over 21—Negro	[b] State-Wide Contested	[b] Congressional Contested		[b] County Local Contested	[b] County Uncontested
1. Abbeville	11,948	7,184	60.12	4,137	34.62	73.36	22.9	26.90	President Only	NC		0	5
2. Aiken	43,686	26,266	83.91	25,089	57.43	69.18	17.4	23.80		NC		2	9
3. Allendale	5,736	3,257	56.78	2,512	43.79	77.12	34.0	55.87		NC		1	1
4. Anderson	57,140	35,226	61.64	20,068	35.12	56.96	19.5	16.79		NC		2	7
5. Bamberg	8,178	5,404	66.07	3,785	46.28	70.04	26.6	46.55		NC		0	5
6. Barnwell	8,894	8,008	90.03	5,052	56.80	63.08	23.2	36.45		NC		0	5
7. Beaufort	17,741	12,065	73.64	9,637	54.32	73.76	28.7	42.95		NC		1	1
8. Berkeley	19,345	8,165	42.20	6,184	31.96	75.73	20.2	27.46		NC		0	5
9. Calhoun	5,941	2,946	49.58	2,203	37.08	74.77	26.0	55.84		NC		3	13
10. Charleston	113,468	62,474	55.95	47,973	41.49	74.16	14.7	31.30			C	1	2
11. Cherokee	19,397	15,286	78.67	7,885	40.65	51.67	25.2	17.32			C	1	6
12. Chester	16,836	12,217	72.56	6,797	40.37	55.63	24.8	33.64			C	1	5
13. Chesterfield	17,318	11,704	67.58	7,083	40.89	60.51	28.4	35.13		NC		0	6
14. Clarendon	12,958	4,519	34.87	3,792	29.26	89.91	32.4	59.69		NC		1	5
15. Colleton	14,383	8,293	57.03	6,668	46.49	46.49	29.3	42.96			C	10	10
16. Darlington	26,606	15,881	59.68	11,727	44.07	73.84	24.1	37.29			C	1	5
17. Dillon	14,254	8,909	62.50	5,515	38.69	61.90	30.6	38.78		NC		6	6
18. Dorchester	12,491	9,056	72.50	6,713	53.74	74.13	25.2	42.99		NC		1	8
19. Edgefield	7,867	4,623	58.76	3,313	42.11	71.66	23.1	47.84			C	2	5
20. Fairfield	10,511	6,275	59.69	4,625	44.00	73.70	30.7	52.66			C	1	11
21. Florence	42,998	25,590	59.51	17,503	40.70	68.39	23.6	37.09			C	0	8
22. Georgetown	16,928	10,978	68.49	8,128	50.71	74.03	31.3	44.75				11	16
23. Greenville	120,970	67,035	55.41	46,645	38.55	69.58	14.4	15.37		NC		1	6
24. Greenwood	25,962	16,264	62.59	11,132	42.84	68.44	17.4	26.03		NC		0	6
25. Hampton	8,763	5,612	64.04	3,698	42.20	65.89	31.8	46.23		NC		0	11
26. Horry	34,947	22,001	62.95	13,737	39.30	62.43	18.9	21.25			C	0	5
27. Jasper	6,022	3,780	62.78	2,595	43.09	68.65	37.1	55.34		NC		0	5
28. Kershaw	17,161	11,881	69.23	8,785	51.19	73.94	23.9	34.39			C	1	6

29. Lancaster	20,975	18,095	86.12	9,712	46.30	53.76	19.3	22.79		C	0		6
30. Laurens	26,593	12,453	50.58	9,446	35.52	70.21	24.2	25.63		NC	0		8
31. Lee	9,849	5,521	56.10	3,645	37.04	66.02	21.6	55.34		C	0		5
32. Lexington	23,556	23,071	68.75	16,848	50.20	73.02	13.9	14.25		NC	3		8
33. McCormick	4,163	2,210	53.08	1,437	34.51	65.02	28.1	53.99		NC	0		12
34. Marion	15,787	7,351	46.56	5,243	33.21	71.32	25.6	48.67		C	0		8
35. Marlboro	14,162	8,352	58.97	4,296	30.35	51.31	29.8	41.88		C	0		5
36. Newberry	17,155	11,471	66.85	8,793	51.24	76.65	20.0	28.87		NC	0		7
37. Oconee	21,902	13,596	61.82	8,272	37.61	60.84	29.4	10.14		NC	2		8
38. Orangeburg	33,736	29,098	59.57	16,063	47.61	79.92	25.9	51.44		NC	0		9
39. Pickens	26,371	16,851	63.89	9,388	35.59	55.71	17.6	08.93		NC	0		8
40. Richland	111,720	60,940	54.54	45,245	40.49	74.24	12.9	29.24		NC	6		19
41. Saluda	7,909	5,950	75.31	3,933	49.78	66.10	17.0	29.45		NC	0		8
42. Spartanburg	90,364	58,945	65.23	38,445	42.54	65.22	18.5	18.86		NC	0		15
43. Sumter	37,384	14,017	37.49	11,504	30.77	82.07	19.8	41.14		NC	0		9
44. Union	16,961	14,510	85.59	7,707	45.42	53.11	23.2	24.33		C	0		9
45. Williamsburg	18,994	9,836	54.35	7,068	39.00	71.75	31.3	58.22		C	0		7
46. York	41,566	24,368	58.02	15,638	37.23	64.17	19.2	24.27		C	8		9
State	1,266,251 1,380,900a	772,572	61.01 55.96	524,764	41.44 38.02	67.92	20.3	29.30			61 17.57%		347 Contested

a 1964 Census figures by County were not available.
b Report of Secretary of State of South Carolina.
c Obtained from South Carolina Department of Education.
d U. S. Commission on Civil Rights, Information Center, March 19, 1965.
e 1964 Census Report.

EXHIBIT B

APPLICATION FOR REGISTRATION

Dated at _____, S. C., _____ day of _____, 19_____.

I, _____, hereby apply for registration as an elector and certify under oath that:

1. I am a female, a member of the _____ race, born at _____, on _____. I reside at _____ Street in the town or city of _____ or on _____ Road in _____ Township or Parish in _____ County. My nearest voting place is _____. My weight is _____ lbs., my height is _____ ft. _____ in., the color of my eyes _____, the color of my hair _____.

☐ 2. (a) I will have resided in South Carolina for at least one year, in this County for at least six months and in my voting precinct for at least three months prior to any election at which I will be entitled to vote if a registration certificate is issued to me upon this application;

☐ (b) I am a minister or spouse of a minister in charge of an organized church in this State and will have resided in South Carolina for a period of six months prior to any such election; or

☐ (c) I am a teacher of public school or spouse of a teacher and will have resided in South Carolina for a period of six months prior to any such election.

☐ 3. I am not an idiot, or insane, a pauper supported at public expense or confined in any public prison.

4. I will demonstrate to the registration board that:

☐ (a) I can both read and write a section of the Constitution of South Carolina; or

☐ (b) I own and have paid all taxes due last year on property in this State assessed at three hundred dollars or more.

☐ 5. (a) I have never been convicted of any of the following crimes: Burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegnation, larceny or crimes against the election laws; or

☐ (b) I have been legally pardoned for such conviction.

_____
Applicant

Sworn to and subscribed before me this _____ day of _____, 19_____.

Examined and found (not) qualified

_____
Member of Registration Board

_____
Member of Registration Board

GENERAL ELECTIONS

	Population Over 21 [a]	Registered [b]	% Registered Over 21	Voted [c]	% Voted Over 21
1962	1,266,251 (1960)	666,694	56.25	312,647	24.69
1960	1,266,251 (1960)	595,989	47.06	386,688	30.53
1958	1,266,251 (1960)	536,205	42.34	77,714	6.13
1956	1,150,867 (1950)	761,162	66.14	300,473	26.10
1954	1,150,867 (1950)			214,599	18.64
1952	1,150,867 (1950)			341,000	29.62
1950	1,150,867 (1950)			50,633	4.39
1948	1,150,867 (1950)			102,607	8.91
1946	991,536 (1940)			26,250	2.64
1944	991,536 (1940)			103,366	10.42
1942	991,536 (1940)			23,877	2.40
1940	991,536 (1940)			99,830	10.06
1938	991,536 (1940)			49,009	4.94
1936	819,384 (1930)			115,437	14.08
1934	819,384 (1930)			22,873	2.79
1932	819,384 (1930)			104,407	12.75
1930	819,384 (1930)			13,790	2.17
1928	819,384 (1930)			68,602	8.37
1926	779,991 (1920)				
1924	779,991 (1920)			50,751	6.50

a. From U. S. Bureau of Census report.
b. From reports of South Carolina Secretary of State. Statistics not available prior to 1
c. From records of South Carolina Secretary of State and U. S. Bureau of Census.
d. From reports of South Carolina Secretary of State. No contest assumed when loser dr
e. From "Tabulation of Votes, South Carolina Democratic Primaries", 1930-1962, 1947 an
statistics available. No contest assumed when loser drew less than 10% of total vo

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EXHIBIT C-1

SOUTH CAROLINA GENERAL ELECTION AND PRIMARY STATISTICS—1924 - 1962

GENERAL ELECTIONS

GENERAL ELECTIONS

...tered ...21	Voted [c]	% Voted Over 21	% Voted Registered	Statewide Races Contested 1 Senate [d]	Con. Races Contested [d]	County Races Contested C	NC	% C
...25	312,647	24.69	46.89		14 counties	27	266	15.15
...06	386,688	30.53	64.88	1 Pres.	-0-	4	356	1.12
...34	77,714	6.13	14.49	0	-0-	7	243	2.88
...14	300,473	26.10	39.47	Pres.				
	214,599	18.64		Sen.				
	341,000	29.62		1 Pres.	-0-	8	370	2.16
	50,633	4.39		0		4	259	1.54
	102,607	8.91		Pres.				
	26,250	2.64						
	103,366	10.42		Pres.				
	23,877	2.40						
	99,830	10.06		Pres.				
	49,009	4.94		0				
	115,437	14.08		Pres.				
	22,873	2.79		Pres.				
	104,407	12.75						
	13,790	2.17						
	68,602	8.37		Pres.				
	50,751	6.50		Pres.				

PRIMARIES [e]

Registered (or Enrolled, Prior to 1950	% Registered Over 21	Voted	% Voted Over 21	% Voted Registered	Statewide Races Contested	Cong. Races Contested (by County)
655,370	51.75	328,291	25.92	50.09	7	21
587,415	46.39	305,931	24.16	52.08	1	0
536,026	42.33	377,239	29.79	70.37	6	8
701,079					0	7
	60.91	302,483	26.28	43.14	4	11
					0	7
567,467	49.30	354,084	30.76	62.39	6	30
506,818	44.03	334,303	29.04	65.91	1	24
453,077	45.69	289,214	29.16	63.83	4	22
401,137	40.45	250,776	25.29	62.51	1	9
375,672	37.88	234,972	23.64	62.54	4	25
439,022	44.27	319,727	32.24	72.82	Referendum	46
423,036	42.66	337,008	33.98	79.66	3	39
481,322	58.74	295,470	36.06	61.38	3	29
375,796	45.86	297,430	36.29	79.14	6	29
417,599	50.96	271,129	33.08	64.92	1	29
306,765	37.43	245,743	29.99	80.10	8	22
		159,246	20.41			
		199,151	25.53			

...of State. Statistics not available prior to 1956.
...of State and U. S. Bureau of Census.
...of State. No contest assumed when loser drew less than 10% of total vote. Incomplete for 1954, 1956 and prior to 1950.
... Democratic Primaries", 1930-1962, 1947 and 1962 eds. and "Southern Primaries and Elections", Heard & Strong. Incomplete for 1956, 1952 and prior to 1930. No county race ...when loser drew less than 10% of total vote.

EXHIBIT C-2

State	% Registered Voting November 3, 1964
Alabama	65.23
Alaska	
Arizona	82.26
Arkansas	84.44
California	86.23
Colorado	83.25
Connecticut	88.72
Delaware	82.00
Florida	74.13
Georgia	62.35
Hawaii	86.59
Idaho	86.59
Illinois	84.97
Indiana	79.57
Iowa	
Kansas	
Kentucky	104.61
Louisiana	74.97
Maine	72.94
Maryland	79.02
Massachusetts	86.15
Michigan	95.56
Minnesota	
Mississippi	73.98
Missouri	
Montana	85.08
Nebraska	
Nevada	82.84
New Hampshire	78.88
New Jersey	87.49
New Mexico	70.46
New York	84.87
North Carolina	64.77
North Dakota	
Ohio	
Oklahoma	78.42
Oregon	84.21
Pennsylvania	
Rhode Island	82.52
South Carolina	67.92
South Dakota	79.26
Tennessee	70.23
Texas	78.67
Utah	89.50
Vermont	77.93
Virginia	79.50
Washington	79.54
West Virginia	75.04
Wisconsin	
Wyoming	

EXHIBIT D-1

Average Per Capita Personal Income[1]

	1960	1950	1940	1929
Alabama	$1462	$ 869	$ 282	$ 324
Alaska	2760	2231	.....	.....
Arizona	2013	1295	497	591
Arkansas	1338	807	256	305
California	2725	1839	840	995
Colorado	2283	1444	546	637
Connecticut	2858	1900	917	1029
Delaware	3002	2146	1004	1017
Florida	1967	1287	513	521
Georgia	1609	1017	340	350
Hawaii	2274	1403	577	.....
Idaho	1765	1279	464	503
Illinois	2636	1826	754	957
Indiana	2188	1520	553	612
Iowa	2022	1449	501	577
Kansas	2060	1380	426	535
Kentucky	1536	958	320	391
Louisiana	1608	1087	363	415
Maine	1871	1193	523	601
Maryland	2398	1580	712	777
Massachusetts	2518	1663	784	913
Michigan	2317	1682	679	793
Minnesota	2074	1397	526	598
Mississippi	1168	733	218	285
Missouri	2204	1446	524	678
Montana	2004	1600	570	595
Nebraska	2129	1472	439	590
Nevada	2791	1938	876	878
New Hampshire	2075	1316	579	690
New Jersey	2663	1790	822	931
New Mexico	1806	1162	375	407
New York	2778	1882	870	1159
North Carolina	1562	1012	328	334
North Dakota	1749	1268	350	375
Ohio	2331	1612	665	781
Oklahoma	1840	1146	373	454
Oregon	2225	1600	623	683
Pennsylvania	2256	1566	648	775
Rhode Island	2193	1652	743	871
South Carolina	1379	882	307	270
South Dakota	1845	1216	359	377
Tennessee	1539	995	339	377
Texas	1917	1339	432	478
Utah	1910	1282	487	559
Vermont	1892	1188	507	627
Virginia	1852	1234	466	435
Washington	2300	1671	662	750
West Virginia	1676	1098	407	462
Wisconsin	2157	1467	554	682
Wyoming	2284	1623	608	677

[1] Statistical Abstract of U. S. by Bureau of Census.

EXHIBIT D-2
% OF ADULT POPULATION ILLITERATE[1]

	1960 % Functional Illiterates—25 Years and Older	1950 % Over 25 Under 5 Years of School Completed	1940 % Over 25 Less Than 5 Years Completed	1930 % Over 21 Illiterate Cannot Read or Write Any Language	1920 % Over 21 Cannot Write Any Language	1910 % Over 21 Cannot Write Any Language
Alabama	16	22.6	28.9	15.9	20.0	26.2
Alaska	8					
Arizona	10	14.1	19.4	11.9	16.1	21.9
Arkansas	15	19.8	23.1	8.7	11.5	16.1
California	5	6.8	8.1	3.1	3.9	4.3
Colorado	4	7.1	9.0	3.5	3.9	4.4
Connecticut	6	8.8	11.2	6 0	7.8	7.2
Delaware	6	9.7	12.9	5.1	7.4	10.0
Florida	9	13.7	18.5	8.3	10.9	15.5
Georgia	17	24.2	30.1	11.7	18.4	24.1
Hawaii	15					
Idaho	3	4.7	5.2	1.4	1.9	2.7
Illinois	6	7.8	9.6	3.1	4.3	4.7
Indiana	4	4.6	7.7	2.1	2.8	3.9
Iowa	3	3.9	4.1	1.0	1.4	2.2
Kansas	3	5.0	6.1	1.5	2.0	2.8
Kentucky	13	16.8	20.2	8.1	10.6	14.5
Louisiana	21	28.7	35.7	16.9	24.9	31.1
Maine	4	6.7	7.4	3.3	3.9	4.7
Maryland	7	10.9	15.3	4.7	6 8	8.7
Massachusetts	6	7.9	10.1	4.5	5.9	6.2
Michigan	5	7.5	10.2	2.5	3.9	4.2
Minnesota	4	5.8	7.5	1.6	2.4	4.0
Mississippi	18	25.2	30.2	16 8	20.8	26.8
Missouri	7	8.4	10.3	2.8	3.8	5.4
Montana	4	6.3	7.4	2.2	2.8	5.5
Nebraska	3	4.9	6.0	1.5	1.8	2.5
Nevada	3	6.8	8.8	5.2	6.7	6.8
New Hampshire	4	6.3	8.1	3.4	5.4	5.5
New Jersey	7	12.1	12.0	5.0	6.6	6.7
New Mexico	12	18.0	27.3	16.7	18.9	23.4
New York	7	9.5	12.1	4 7	6.4	6.6
North Carolina	16	21.1	26.2	13.1	16.9	22.6
North Dakota	6	8.8	10.8	2.0	2.9	3.7
Ohio	5	6.9	8.4	2.9	3.6	4.0
Oklahoma	8	11.0	13.2	3.5	4.7	6.9
Oregon	3	4.3	5.2	1.2	1.8	2.2
Pennsylvania	6	9.4	12.3	4.1	6.0	7.3
Rhode Island	7	9.7	13.7	6.4	8.2	9.2
South Carolina	20	27.4	34.7	18.6	23.0	29.6
South Dakota	4	5.9	7.2	1.6	2.2	3.7
Tennessee	14	18.3	21.7	9.0	12.6	16.3
Texas	13	15.8	18.8	7.9	9.6	11.6
Utah	2	4.4	5.5	1.6	2.5	3.1
Vermont	3	5.5	6.1	2.7	3.8	4.6
Virginia	13	17.5	23.2	10.8	13.5	17.9
Washington	3	4.6	5.9	1.3	2.1	2.3
West Virginia	11	13.7	16.5	6.3	8.2	10.2
Wisconsin	5	7.1	9.4	2.4	3.2	4.2
Wyoming	3	5.7	7.1	2.0	2.5	3.8

[1] Statistics obtained from reports of U. S. Bureau of Census for appropriate years.

EXHIBIT E 1

IN THE

Supreme Court of the United States

October Term 1965

NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

AFFIDAVIT

State of South Carolina
County of Richland

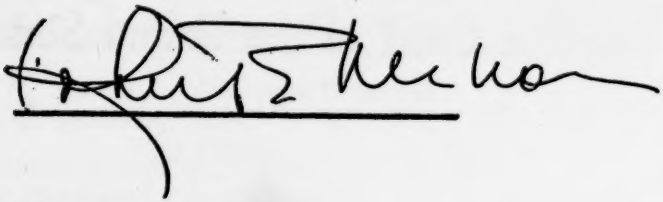
PERSONALLY appeared before me Robert E. McNair who, being duly sworn, deposes and says:

1. That he is Governor of the State of South Carolina and has served in that capacity since April 23, 1965.

2. That he has caused a search of the records of his office to be made since January, 1963 with respect to any complaints about the administration of the literacy test of South Carolina in connection with registration of inhabitants to vote in the State of South Carolina.

3. That according to his search of the records of his office and of affiant's personal knowledge during the occupancy of his office, there have been no complaints filed with him or his office over existence or administration of the literacy test in connection with the voter registration of

the inhabitants of South Carolina raising any question of the right of the registrant to register and vote on account of race, color or previous condition of servitude, or otherwise.



SWORN to before me this 24th
day of September, 1965.

DAVID W. ROBINSON, II (LS)
Notary Public for South Carolina
My Commission expires at pleasure of the Governor

EXHIBIT E 2

IN THE

Supreme Court of the United States

October Term 1965

NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

AFFIDAVIT

State of South Carolina
County of Richland

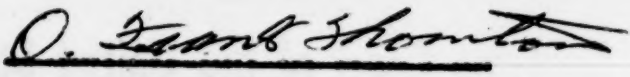
PERSONALLY appeared before me O. Frank Thornton who, being duly sworn, deposes and says:

1. That he is Secretary of State of the State of South Carolina and has served in that capacity since Feb. 1, 1950.

2. That he has caused a search of the records of his office to be made since Feb. 1, 1950 with respect to any complaints about the administration of the literacy test of South Carolina in connection with registration of inhabitants to vote in the State of South Carolina.

3. That according to his search of the records of his office and of affiant's personal knowledge during the occupancy of his office, there have been no complaints filed with him or his office over existence or administration of the literacy test in connection with the voter registration of the

inhabitants of South Carolina raising any question of the right of the registrant to register and vote on account of race, color or previous condition of servitude, or otherwise.



SWORN to before me this 24th
day of September, 1965.

DAVID W. ROBINSON, II (LS)
Notary Public for South Carolina
My Commission expires at pleasure of the Governor

EXHIBIT E 3

IN THE

Supreme Court of the United States

October Term 1965

NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

AFFIDAVIT

State of South Carolina
County of Richland

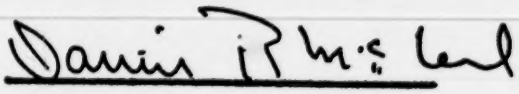
PERSONALLY appeared before me Daniel R. McLeod who, being duly sworn, deposes and says:

1. That he is Attorney General of the State of South Carolina and has served in that capacity since January 1959.

2. That he has caused a search of the records of his office to be made since 1940 with respect to any complaints about the administration of the literacy test of South Carolina in connection with registration of inhabitants to vote in the State of South Carolina.

3. That according to his search of the records of his office and of affiant's personal knowledge during the occupancy of his office, there have been no complaints filed with him or his office over existence or administration of

the literacy test in connection with the voter registration of the inhabitants of South Carolina raising any question of the right of the registrant to register and vote on account of race, color or previous condition of servitude, or otherwise.



SWORN to before me this 24th
day of September, 1965.

DAVID W. ROBINSON, II (LS)
Notary Public for South Carolina
My Commission expires at pleasure of the Governor

EXHIBIT F 1

Department of Justice
Washington

August 8, 1965

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Columbia, South Carolina

Dear General McLeod:

I am writing to advise you that Attorney General Katzenbach has sent the Voting Rights Act of 1965 and the Civil Service regulations published yesterday, together with a letter from him, to the Chairman of each county Board of Registrars in the State of South Carolina. Copies of these documents are enclosed.

In the event that you or any members of your staff have any questions regarding this law, please feel free to call me. I want to do all I can to assist in bringing about compliance with this law.

Sincerely,

John Doar

JOHN DOAR
Assistant Attorney General
Civil Rights Division

Enclosures

EXHIBIT F 2

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C.
August 7, 1965

I am writing to explain the provisions of the Voting Rights Act of 1965. The Act was signed into law by the President on August 6, 1965, and is now in effect in South Carolina.

Basically, the Act suspends the use of all literacy, knowledge and character tests and devices as voter qualifications in every county in each state where less than 50 percent of the residents of voting age were registered on November 1, 1964, or voted in the presidential election of November, 1964. This includes South Carolina, and for that reason tests which you may have required applicants for registration to take in accordance with state law cannot now be used as a qualification for voting.

Until recently, applicants for voter registration in South Carolina have been required to read and write portions of the Constitution if they did not provide evidence of ownership of sufficient property. Under the Voting Rights Act of 1965 the reading and writing test must be discontinued, and applicants who are otherwise qualified are entitled to be registered whether or not they own sufficient property. The other registration requirements such as age, residence, citizenship, sanity and non-conviction of a crime are not effected by the Voting Rights Act of 1965.

I enclose for your study a copy of the Voting Rights Act of 1965, and the Civil Service regulations. You will see that the Act authorizes the appointment of Federal Examiners to register eligible voters where I determine that their appointment is necessary to enforce the constitutional guarantee against voting discrimination, or where I receive twenty bona fide complaints of discrimination. Thus, the decision to appoint examiners will be made where it is clear that past denials of the right to vote justify it or where present compliance with federal law, including the

Voting Rights Act, is insufficient to assure prompt registration of all eligible citizens.

The primary responsibility for registration remains with state and county officials. Even where examiners are appointed, the President has stated, "When the prospect of discrimination is gone, the examiners will be immediately withdrawn."

If you have any questions regarding the new law please feel free to call upon our attorneys in the Department of Justice or write to us. I want to be as helpful as possible to you in bringing about compliance with the requirements of this law.

Sincerely,

NICHOLAS DEB. KATZENBACH
Attorney General

EXHIBIT F 3

[Reprinted from "Notices" from the Federal Register of August 7, 1965]

DEPARTMENT OF COMMERCE

BUREAU OF THE CENSUS

Determination of the Director of the Census pursuant to Section 4(b)(2) of the Voting Rights Act of 1965 (Public Law 89-110)

I have this date received a letter from the Attorney General advising me that he has determined that the following States maintained on November 1, 1964, one or more tests or devices as defined in section 4(c) of the Act:

Alabama
Alaska
Arizona
California
Connecticut
Delaware
Georgia
Hawaii
Idaho
Louisiana
Maine
Massachusetts
Mississippi
New Hampshire
New York
North Carolina
Oregon
South Carolina
Virginia
Washington
Wyoming

In accordance with section 4(b)(2) of the Voting Rights Act of 1965 (Public Law 89-110), I have determined that in each of the following States less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1964:

Alabama
Alaska
Georgia
Louisiana
Mississippi
South Carolina
Virginia

I have also determined that in each of the following political subdivisions considered as a separate unit less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1964:

NORTH CAROLINA

Anson County
Bertie County
Caswell County
Chowan County
Craven County
Cumberland County
Edgecombe County
Franklin County
Gates County
Granville County
Greene County
Halifax County
Hertford County
Hoke County

Lenoir County
Nash County
Northampton County
Onslow County
Pasquotank County
Person County
Pitt County
Robeson County
Scotland County
Vance County
Wayne County
Wilson County

ARIZONA

Apache County

Current studies of other political subdivisions will be completed as soon as the relevant data are obtained and in accordance with the Voting Rights Act of 1965, I will make additional determinations for such political subdivisions in which less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or in which less than 50 per centum of such persons voted in the presidential election of November 1964.

A. ROSS ECKLER, *Director*
Bureau of the Census.

August 6, 1965.

[F.R. Doc. 65-8417; Filed, Aug. 6, 1965; 3:01 p.m.]

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

Determination of the Attorney General pursuant to Section 4(b)(1) of the Voting Rights Act of 1965

In accordance with section 4(b)(1) of the Voting Rights Act of 1965 (Public Law 89-110), I have determined that each of the following States maintained on November 1, 1964, one or more tests or devices as defined in section 4(c) of the Act:

Alabama
Alaska
Arizona
California
Connecticut
Delaware
Georgia
Hawaii
Idaho
Louisiana
Maine
Massachusetts
Mississippi
New Hampshire
New York
North Carolina
Oregon
South Carolina
Virginia
Washington
Wyoming

NICHOLAS DEB. KATZENBACH,
Attorney General.

August 6, 1965.

[F.R. Doc. 65-8416; Filed, Aug. 6, 1965; 3:00 p.m.]

NO. ....., ORIGINAL

IN THE

Supreme Court of the United States

October Term 1965

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

BRIEF OF THE PLAINTIFF

DANIEL R. MCLEOD
Attorney General
State of South Carolina
DAVID W. ROBINSON
DAVID W. ROBINSON, II
Special Counsel
P. O. Box 1942
Columbia, S. C.

ROBINSON, MCFADDEN & MOORE
OF COUNSEL

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Argument

I.

The Act, in creating an arbitrary and irrebuttable presumption of a violation of the Fifteenth Amendment solely by the Plaintiff and certain other Sovereign States, violates the principles of equality of statehood with respect to the Plaintiff and Her Political Subdivisions, deprives her inhabitants of rights guaranteed under Article IV, §2 and the Fifth Amendment to the Constitution of the United States, and exceeds the powers granted Congress under the Fifteenth Amendment to the Constitution of the United States 50

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IN THE

Supreme Court of the United States

October Term 1965

NO. ....., ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

BRIEF FOR THE PLAINTIFF

JURISDICTION

The Plaintiff is a Sovereign State of the United States. The Defendant is a resident of a State other than the Plaintiff and is currently serving as the Attorney General of the United States. The jurisdiction of this Court is invoked under Article III, §2, Clauses 1 and 2 of the Constitution of the United States.

QUESTION PRESENTED

Whether "The Voting Rights Act of 1965" violates the constitutional rights of the Plaintiff and her inhabitants under Article I, §§2, 4 and 9, Article III, Article IV, §2, Fifth Amendment, Fifteenth Amendment, and Seventeenth Amendment to the Constitution of the United States.

STATEMENT

On August 6, 1965, the Congress passed, and the President of the United States approved, "The Voting Rights Act of 1965", Public Law 89-110, 89th Congress, S.1564.[1] On August 7, 1965, the Defendant and the United States Bureau of the Census published certain certificates in the "Federal Register" and on August 8, 1965 the Defendant purported to invoke certain sections of the Act with respect to the Plaintiff's voter registration and election procedures.

INTRODUCTION

This action draws in question the constitutionality of an attempt by the Congress and President to regulate and restrict the Plaintiff's power to prescribe reasonable and lawful qualifications for her inhabitants to register and vote and otherwise control her election procedures. The Plaintiff's interest in this question, as a Sovereign State, is immediate, vital and clearly justiciable.

Under the Constitution of the United States and her own Constitution and laws, the Plaintiff is particularly responsible to her inhabitants to provide and preserve to them a fair and reasonable election process to insure the best possible government. An essential part of this duty consists of furnishing the opportunity of her lawfully selected electorate to participate in her elections equally and without dilution in the extent of the exercise of that sufferage right.

Only recently has this Court, through such decisions as *Reynolds v. Sims*, 377 U.S. 533, *Gray v. Sanders*, 372 U.S. 368 and *Baker v. Carr*, 369 U.S. 186, finally recognized and held justiciable this critical obligation of the Sovereign States to their inhabitants. As a part of this function to prevent the debasement and dilution of the vote of her constitutional and literate electorate by the illegal injection

[1] Hereinafter referred to as "the Act". Pertinent provisions of the Constitution of the United States and the entire Act are reproduced in Appendix B. p. 76.

of the votes of illiterates, and thus incompetents in the field of government, the Plaintiff, as *parens patriae* to her inhabitants, brings this action. In effect, she is asserting for her inhabitants that the National Sovereign may not direct her to violate the rights of her citizens secured under the Fifth Amendment, which same rights this Court in these recent decisions has protected under the Fourteenth Amendment.

This invasion to which the Plaintiff objects strikes at the very heart of the manner of selection, and thus the future operation, of the government of her inhabitants, and all the myriad subjects and areas which it regulates and governs. Her interest and capacity to raise these assertions are closely akin to that of Georgia in *Georgia v. Penn. Rwy. Co.*, 324 U.S. 439, where this Court said:

> "Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction." p. 451

Nor is the Plaintiff here asserting any rights or relationships of her inhabitants for which the Federal Government, not the State, stands *parens patriae*, as in the case of *Massachusetts v. Mellon*, 262 U.S. 447 involving the federal taxing power. As will be shown, the rights here asserted lie within the peculiar province of the Plaintiff as a Sovereign State, not the National Sovereign. In the *Massachusetts v. Mellon* decision this Court was careful to preserve,

for circumstances such as these, the right of the Sovereign State to assert the rights of its citizens when it said:

> "We need not go so far as to say that a State may never intrevene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress, but we are clear that the right to do so does not arise here." *Massachusetts v. Mellon*, supra, p. 485

Likewise, the Constitution of the United States specifically charges the Plaintiff, in her Sovereign capacity, with the responsibility of providing reasonable election qualifications and procedures for her inhabitants. It is also in this quasi-Sovereign capacity that the Plaintiff has brought this action to prevent the unconstitutional interference with her exclusive responsibilities.

Such was the interest of Missouri in *Missouri v. Holland* 252 U.S. 416, where this Court sustained the right of a Sovereign State to bring a bill seeking to enjoin a federal game warden from enforcing alleged unconstitutional federal regulation dealing with migratory waterfowl. So also in *Colorado v. Toll* 268 U.S. 228, this Court upheld the right of Colorado, in her quasi-Sovereign capacity, to challenge the validity of regulations issued by a National Park Superintendent which allegedly derogated from her exclusive authority over her inhabitants.

Finally, this Court has recognized that the interest of the Sovereign State, in its quasi-Sovereign capacity, is more than proprietary and extends beyond the private interests and rights of her citizens:

> "This is a suit by a state for an injury to it in its capacity as quasi-Sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeway, and we may lay on one side of the dispute as to whether the destruction

of forests has led to the gullying of its roads." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237.

See also *Georgia v. Penna. Rwy. Co.*, supra, 447-448

Furthermore, both the Congress and the President have specifically acknowledged the interest which the Plaintiff now asserts. By tying the applicability of certain of its provisions to the previous voting record of the Plaintiff's inhabitants on November 3, 1964, the Act is as specifically directed to the Plaintiff as a Sovereign State and to certain other Sovereign States, as if they were individually named therein. The terms of the Act itself apply to the conduct of the Plaintiff as a Sovereign State, authorize her to institute litigation to invoke its terms, permit her to be sued in her Sovereign capacity; and otherwise generally recognize her direct interest in its subject matter.[2]

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[2] "§2 No voting qualification . . . shall be imposed . . . by *any State* or political subdivision . . ."

"§3(a) . . . provided, that the Court need not authorize the appointment . . . if any incident . . . had been properly and effectively corrected *by State* or local action."

"§3(c) . . . provided that such qualification . . . may be enforced if the qualification . . . has been submitted by the chief legal officer or other appropriate official *of such State* . . ."

"§4(a) . . . no citizen shall be denied the right to vote . . . unless the United States District Court for the District of Columbia in an action for declaratory judgment brought *by such State* or subdivision . . ."

"§4(d) . . . *no State* or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose . . . of denying . . . the right to vote . . . if (1) incidents . . . have been . . . effectively corrected *by State* or local action."

"§4(e)(1) Congress hereby declares that . . . it is necessary to *prohibit the States* from conditioning the right to vote."

"§5 Whenever *a State* or political subdivision . . . shall enact . . . any voter qualification . . . *such State* or subdivision may institute an action in the United States District Court for the District of Columbia . . ."

"§7(b) Any person whom the examiner finds . . . to have qualifications prescribed *by State* law . . . the examiner shall certify . . . with copies to . . . the Attorney General *of the State* . . ."

"The appropriate *State* or local election officials shall place such names on the official voting lists."

"§10(a) The Congress finds that the requirement of the payment of a poll tax . . . does not bear a reasonable relationship to any *legitimate State interest* in the conduct of election . . ."

"§10(b) In the exercise of the powers of Congress . . . the Attorney General is authorized . . . to institute forthwith in the name of the United States such actions, including actions *against States* or political subdivision . . ."

"§12(c) Whenever any person has engaged . . . in any act or practice prohibited . . . the Attorney General may institute . . . an action for preventive relief . . . directed *to the State and State* or local election officials to require them (1) to permit the persons listed under this Act to vote and (2) to count such votes."

"§16 The Attorney General . . . shall make a full and complete study to determine under the laws or practices of *any State or States*." [Emphasis added]

This express Congressional recognition of the Plaintiff's interest in the Act, as a Sovereign State, sustains her right to maintain this action to test its validity.[3]

Nor can it be said that this interest is not immediate and vital to the Plaintiff. If valid, the Act will require her to revise her voter registration procedures;[4] it may affect the makeup of her civil and criminal juries;[5] it may affect the eligibility of candidates for her public offices;[6] and it probably will require her to revise many of her election procedures.[7] Even more pressing, it prevents her from enacting any changes to improve her existing election procedures.[8]

In summary, the Plaintiff has a clear, justiciable interest in, and recognized capacity to bring, this action to question the constitutionality of this attempt by the Federal Government to regulate her election procedures.[9]

SUMMARY OF ARGUMENT

The Act deprives South Carolina and certain other States of their right to prescribe certain lawful voter registration requirements and to regulate their elections solely because less than 50% of their inhabitants over 21 voted in the November 1964 general election. No such proscription

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[3] Compare the conclusions drawn by this Court in seeking the Congressional intent from the language of the Taft-Hartley Act in *Textile Workers Union of American v. Lincoln Mills of Alabama*, 353 U.S. 448.

[4] §4 of the Act.

[5] Article V, §22 of the Constitution of South Carolina, providing for jury trials, states in part: ". . . Each juror must be a qualified elector under the provision of this Constitution, between the ages of twenty-one and sixty-five years, and of good moral character."

[6] Article XVII, §1 of the Constitution of South Carolina provides in part: "No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector . . ."

[7] See, for example, §§7, 9 and 12 of the Act.

[8] §5 of the Act.

[9] No attempt has been made to anticipate the argument that this action cannot be maintained on the ground that it is in reality a suit against the United States. We would only refer the Court to the prayer of the Complaint and point out that no proprietary interest of the Federal Government is at stake. The Plaintiff simply requests that the enforcement of an unconstitutional Act of the Congress be enjoined. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Dugan v. Rank*, 372 U.S. 609; *Ohio v. Helvering*, 292 U.S. 360; *Minn. v. Hitchcock*, 185 U.S. 373.

is imposed upon other States with similar registration requirements for the sole reason that their voter participation exceeded this percentage. Similarly no such restrictions are directed to certain other states who had different registration requirements, but whose voting records were similar to the Plaintiffs and who have been charged with "massive racial discrimination" in voting.

The statutory presumption of racial discrimination in her voter registration procedures so directed to the Plaintiff is irrebuttable and arbitrary. It cannot be overcome by proof of facts existent at the time of those to which it is tied. Voter participation does not reflect misconduct in voter registration. The presumption permits no consideration of other factors affecting the participation of Plaintiff's electors in her general elections.

In applying only to the Plaintiff and certain other States, because of an arbitrary and irrebuttable presumption, the Act violates the principal of Equality of Statehood and deprives her inhabitants of rights secured under the Fifth and Fifteenth Amendments, and Article IV, §2.

The Act grants certain of the Plaintiff's inhabitants the right to vote in all elections in violation of her Constitution and laws. Thereby, in effect, Congress has directed the Plaintiff to dilute the value and weight of the role of her constitutional electorate in violation of the Fifth Amendment, which she might not do under the Fourteenth Amendment.

The Act also denies the Plaintiff the right to promulgate freely new election laws, supersedes her criminal election provisions and limits her regulation of elections and registration. Her registration requirements are lawful and have been lawfully administered. In so doing it exceeds all powers granted Congress under the Fifteenth Amendment and deprives the Plaintiff and her inhabitants of rights reserved exclusively to the States, as recognized in Article I, §§2 and 4 and the Seventeenth Amendment.

The Act fails to deal with the problem of racial discrimination in voting on a national level, as it exists in known

areas according to the evidence presented to the Congress. It applies to some states and subdivisions where no such prior discrimination has been known to exist. The Plaintiff's recent history reveals no need for the application of such radical legislation and extreme remedies to South Carolina and her inhabitants. Past violations of the Fourteenth Amendment in other areas afford no justification for such discriminatory legislation. The Act is thus not "appropriate" legislation and therefore violates the Fifteenth Amendment.

On November 3, 1964 it was lawful for more than 50% of the inhabitants of a State, over 21, to refrain from voting. Because of such occurrence on that date, the Plaintiff and her inhabitants are denied basic Constitutional rights by the Act. In so adjudging South Carolina, Congress has performed a judicial function. The Act is an unlawful Bill of Attainder and *ex post facto* law.

ARGUMENT

I

THE ACT, IN CREATING AN ARBITRARY AND IRREBUTTABLE PRESUMPTION OF A VIOLATION OF THE FIFTEENTH AMENDMENT SOLELY BY THE PLAINTIFF AND CERTAIN OTHER SOVEREIGN STATES, VIOLATES THE PRINCIPLES OF EQUALITY OF STATEHOOD WITH RESPECT TO THE PLAINTIFF AND HER POLITICAL SUBDIVISIONS, DEPRIVES HER INHABITANTS OF RIGHTS GUARANTEED UNDER ARTICLE IV, §2 AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND EXCEEDS THE POWERS GRANTED CONGRESS UNDER THE FIFTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

After properly recognizing, in its opening language, that a literacy test may not be applied to deprive a citizen of

the right to vote on account of race,[10] the Act absolutely prohibits South Carolina from lawfully enforcing her Constitutional literacy test.[11] She is likewise barred from amending or changing her voter registration and election laws without prior Federal approval,[12] is exposed to Federal "examiners" to supervise and administer her election procedures at the whim of the Attorney General,[13] and is forbidden recourse to her own courts and those of the Federal Government within her territories to question the applications of the Act's provisions.[14]

In contra-distinction, other sister Sovereign States are free to continue the administration of their similar literacy tests,[15] and are free to enact new literacy tests similar or more stringent than South Carolina's without suffering such prohibitions to their Sovereign power and the rights of their inhabitants.[16] Likewise political subdivisions of other sister States are left free of these restrictions solely because their voting records exceeded 50% of their inhabitants over twenty-one in November 1964, but certain of Plaintiff's counties are covered although their vote was comparable.[17] Even those counties individually restricted in other Sovereign States are permitted to avoid the Act by a court determination as to their own prior conduct only, a right denied like political subdivisions of the Plaintiff.[18]

In view of the oft-quoted language of this Court that:

> " 'This Union' was and is a union of states, equal in power, dignity and authority, each competent to exert

[10] §2 of the Act.

[11] §4(a)(b) of the Act. In the same category are Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia and counties in North Carolina, Arizona, Idaho and Maine.

[12] §5 of the Act.

[13] §6(b) of the Act.

[14] §14(b) of the Act.

[15] Literacy tests may continue to be enforced in most of Arizona, California, Connecticut, Delaware, Hawaii, most of Idaho and Maine, Massachusetts, New Hampshire, New York, parts of North Carolina, Oregon, Washington and Wyoming, all not covered by the Act.

[16] All states except those branded "guilty" (foot note 11) are free in this respect.

[17] See Complaint Exhibit C-1, Lines 2, 6, 18, 22, 28, 32 and 36, p. 18-19.

[18] §4(a) of the Act.

that residium of sovereignty not delegated to the United States by the Constitution itself,"[19]

and

"For equality of States means that they are not 'less or greater, or different in dignity or power'."[20]

and its firm application of those principles to prevent their violation by Congressional legislation,[21] the Congressional reasons for this constitutionally divergent treatment of Sister States and their political subdivisions demands this Court's sharpest examination.

There are three reasons given by the face of the Act:

(1) The enforcement of the Fifteenth Amendment to prevent illegal discrimination in the right to vote on account of race, color or previous condition of servitude,

(2) The failure of over 50% of South Carolina's inhabitants over the age of twenty-one to vote on November 3, 1964,[22] and

(3) The existence of South Carolina's literacy test as a prerequisite to voter qualification.

For these reasons, Congress and the President have concluded that South Carolina and her political subdivisions have racially discriminated in the administration of her literacy test as a prerequisite *to the registration of her citizens*, solely because of the failure of over 50% of her inhabitants *to vote* on November 3, 1964.[23]

To state the basis of the presumption is to reveal its arbitrariness. South Carolina is branded guilty of violating the Fifteenth Amendment *in the registration of her citizens*, solely because of the number who *actually voted*,

[19] *Coyle v. Smith*, 221 U.S. 559, 567.

[20] *U. S. v. Texas*, 339 U.S. 707, 720.

[21] *Coyle v. Smith*, supra; *Escanaba & L. N. Transportation Co. v. Chicago*, 107 U.S. 678. See also *Illinois Central Rrd. Co. v. Illinois*, 146 U.S. 387; *Butler v. Thompson*, 97 F. Supp. 17 (E. D. Va. 1951) aff. 341 U.S. 937.

[22] Actually 38% of South Carolina's inhabitants over 21 voted. By federal estimates, 56% of her inhabitants over 21 were then registered to vote. *Hearings*, H. R. 6400, Ser. No. 2, p. 29.

[23] The last two reasons would equally support the presumption of discrimination against women in voting in violation of the Nineteenth Amendment.

aside from any consideration of the degree to which her registered voters actually participated in the election.[24] The presumption finds discrimination by South Carolina when she had registered, on November 1, 1964, 56% of her inhabitants *with* a literacy test, but finds no discrimination by Arkansas (56% registered), Florida (54% registered), Kentucky (51% registered) and Texas (56.3% registered) who registered their citizens *without* a literacy test. The Act presumes discrimination on the part of South Carolina solely for her failure to vote over 50% of her inhabitants over age twenty-one on November 3, 1964, yet concludes there was no discrimination against the inhabitants of Arkansas, Texas and the District of Columbia who also voted less than 50% of their inhabitants over age twenty-one on that date.[25]

While so ignoring the voting records of other Sister States, the Act's arbitrary presumption equally ignores reported evidence presented to Congress prior to its passage. Repeatedly the Defendant testified that South Carolina was free of any continuing and numerous incidents of voter discrimination.[26] On the other hand, the record before the Congress in like manner revealed that other Sovereign States, not so restricted and proscribed by the Act, were guilty of the "massive discrimination" to which the Act supposedly was directed.[27]

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[24] See Complaint, Exhibits A and C-2, p. 18-19, 23. Compare the percentage turnout of registered voters in the counties with the highest percentage Negro population.

[25] If all of South Carolina's illiterates were excluded from the category of eligible population over 21, approximately 50% of her inhabitants over that age did vote on November 3, 1964. Complaint Exhibit A, p. 18-19.

Perhaps the best examples of the artificiality and arbitrariness of the statutory tests of the Act's application are found in the territories which it caught up. We seriously question the existence of any "massive discrimination" in Alaska, yet it is covered. So ridiculous was the coverage of Elmore County, Idaho and Aroostook County, Maine to prevent racial voter discrimination, that the Bureau of Census has not even bothered to certify their coverage. Complaint, Par. 22, Exh. F-3, p. 35-36. But see the statistics furnished Congress showing their coverage. *Hearings*, H.R. 6400 Ser. No. 2, p. 44; *Hearings*, S 1564 Pt. 2, 1513-1514.

[26] *Hearings*, H. R. 6400 Ser. No. 2, p. 12, 112-120; *Hearings* S 1564 Pt. 1, p. 17, 39. While admitting that some innocents were caught, the Defendant sought to justify the presumption as to South Carolina by alleged violations of the Fourteenth Amendment. See pp. 67 to 68, supra.

[27] *Hearings*, H. R. 6400, Ser. No. 2, p. 27, 76-77, 287.

Finally, the presumption of constitutional misconduct resulting in the Act's absolute application to South Carolina fails to permit examination of other factors which affected the number of her inhabitants who voted on November 3, 1964. Her recent history of a one-party Democratic primary system is worthy of judicial notice by this Court,[28] and has been reflected in the decisions of a United States District Court in her own territory. See *Elmore v. Rice*, 72 F. Supp. 216 (E.D.S.C. 1947). With the effective selection of her principal local and state officers occurring in her primaries, there has been no reason for general election participation by her inhabitants.[29] Perhaps even more significant has been the retarded economic and educational level of her residents, as compared to those of the inhabitants of many of her Sister States against whom her voting record was matched. See Complaint Exhibits D-1 and D-2, p. 24-25. It cannot validly be denied that these factors affect the interest of a citizenry in the participation in governmental affairs of a sovereign, nor that South Carolina's disabilities in this regard stem in large part from factors beyond her economic control, as recognized by this Court in *New York v. United States*, 331 U.S. 284.[30]

Against this background of the artificiality and arbitrariness of the presumption created by the Act, South Carolina would remind this Court of its previous warnings to Congress under the Fifth Amendment and to the Sovereign States under the Fourteenth Amendment, both embodying the principles of Equality of Statehood:

> "The provision therefore sweeps within its prohibition both knowing and unknowing members . . . 'In-

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[28] Compare *U. S. v. Classic*, 313 U.S. 299; *Ray v. Blair*, 334 U.S. 214; *U. S. v. Mississippi*, ___ U.S. ___, 13 L.ed. 2d 717; *U. S. v. Louisiana*, ___ U.S. ___, 13 L.ed. 2d 709.

[29] See Complaint, Exhibit CI, p. 21. See also *Hearings*, S 1564 Pt. 1, p. 267-269.

It is impossible to transmit proof to this Court of the widespread dissatisfaction with the National Democrtaic Party, and inherited dislike and distrust of the National Republican Party which kept many of her registered voters at home on November 3, 1964.

[30] For an interesting analysis of the effect of these factors in the 1956 General Election, see McCanaughy & Gauntlett, "A Survey of Urban Negro Voting Behavior in South Carolina," 14 S.C.L.Q. 365, 379 (1962).

discriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power'." *Aptheker v. Secretary of State*, 378 U.S. 500, 510

"Classification 'must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which classification is proposed, and can never be made arbitrarily and without any such basis . . . Arbitrary selection can never be justified by calling it classification', . . .

"The Courts much reach and determine the question of whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded." *McLaughlin v. Florida*, ... U.S. ...., 13 L. ed. 2d 222, 227-228.

See also *Carrington v. Rasch*, ... U.S. ...., 13 L. ed 2d 675, 678; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153-154; *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547; *Bordens Farm Products Co. v. Baldwin*, 293 U.S. 194, 209-210.

The Defendant undoubtedly will contend this invidious presumption or classification is not constitutionally defective since the Plaintiff is afforded the opportunity by the Act to remove its restrictions. *But South Carolina is afforded no opportunity to rebut the statutory presumption of wrongdoing on November 3, 1964.*

The only relief granted South Carolina under the Act is the opportunity to prove, not that she was free of racial discrimination in the use of her literacy test when less than 50% of her inhabitants over twenty-one voted on November 3, 1964, *only* that no such discrimination has occurred in her borders within five years prior to the institution of her suit.[31] Thus the presumption of her wrongdoing on November 3, 1964 is *irrebuttable.*

[31] §4 of the Act. If the only discrimination occurred on the 365th day of the fifth year, the Act would still apply.

Heretofore this Court has not hesitated to strike down similar Congressional and State legislation affording no opportunity to refute the fact irrebuttably presumed by the legislation.

> "The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor . . . and although the tax explicity is based upon circumstances that the thought of death must be the impelling cause of the transfer, . . . the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest . . ." *Heiner v. Donnan*, 285 U.S. 312, 327-328.

See also *Bailey v. Alabama*, 219 U.S. 219, 238-239; *Manley v. Georgia*, 279 U.S. 1, 5-6; *Western Atlantic Railroad v. Henderson*, 279 U.S. 639.

Even if such an irrebuttable presumption were constitutionally permissible in some contexts, it has the effect here of shifting to the Plaintiff and her inhabitants the overwhelming burden of proving their innocence because of a legislative conclusion completely unrelated to the facts to be disproved, in the absence of any direct proof of guilt by the accuser.

> "Due process demands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser v. Randall*, 357 U.S. 513, 526.

> "It is 'essential that there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate' . . . The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86.

See *Tot v. United States*, 319 U.S. 463, 467-468; *Morrison v. California*, 291 U.S. 82, 90-91.[32]

Finally, in judging the reasonableness and constitutionality of this legislative presumption directed solely to the Plaintiff and certain other "guilty" States, this Court should be fully aware that the Act limits South Carolina's judicial remedy for construction and review of its applicability, for a review of her prior conduct, and for determination of the acceptability of any new election laws which her inhabitants might desire, to a Federal Court over 400 miles from her borders in the District of Columbia.[33] While such a restriction has been held permissible for emergency wartime measures and the particular questions they raise,[34] there is no precedent in the history of this Union for the complete removal from her boundaries of the resolution of issues so vital to the continued constitutional existence of a Sovereign State and the government of her inhabitants.

In singling out the Plaintiff and certain other Sovereign States for the application of certain of its provisions solely because of an arbitrary and irrebuttable presumption, the Act violates the fundamental principles of Equality of Statehood, the rights preserved to the Plaintiff's inhabitants against the national sovereign under Article IV, §2 and the Fifth Amendment to the Constitution of the United States, and exceeds any powers granted Congress under the Fifteenth Amendment.

> "To this we may add that the constitutional Equality of States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, *but the Union will not be the Union of the Constitution.*"[35]

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[32] We question the ability of any Sovereign State to prove the absence of minimal discrimination in the administration of its laws when a substantial proportion of its population consists of a racial or foreign national origins minority. See the Defendant's opinion. *Hearings*, H. R. 6400, Ser. No. 2, p. 27.

[33] In this connection it is noteworthy that the Plaintiff is denied subpoena powers for witnesses over 100 miles distant from the District of Columbia, except with that Court's approval. Sec. 14d of the Act.

[34] *Bowles v. Willingham*, 321 U.S. 503; *Lockerty v. Phillips*, 319 U.S. 182.

[35] *Coyle v. Smith*, supra p. 580. [Emphasis added].

II

THE ACT, IN ABOLISHING THE PLAINTIFF'S LITERACY TEST, AND PURPORTING TO REGULATE HER ELECTIONS, VIOLATES HER RIGHT TO PRESCRIBE REASONABLE VOTER QUALIFICATIONS AND REGULATE HER ELECTIONS AS RECOGNIZED IN ARTICLE I, §§2 AND 4 AND THE SEVENTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND FURTHER IMPINGES UPON THE RIGHTS OF HER INHABITANTS UNDER THE FIFTH AMENDMENT AND ARTICLE IV, §2 OF THE CONSTITUTION OF THE UNITED STATES.

From its inception, the Constitution has specifically confirmed the reservation to the Sovereign States of their right to prescribe the qualifications of their voters and to regulate their elections generally.

> ". . . and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Article I, §2.
>
> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; . . ." Article I, §4.

Over forty years after the enactment of the Fifteenth Amendment, the members of the Constitutional compact again reaffirmed this distinctive division of powers between the National Sovereign and the States.

> ". . . the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature . . ." Seventeenth Amendment to the Constitution of the United States.

Likewise there perhaps has never been any principle of Constitutional law more consistently and firmly stated by this Court than that to the effect that the right to vote is derived from the State, not the National Sovereign, and

that it is to be exercised as the State may direct upon such conditions and qualifications as the State may prescribe, so long as that administration is free of racial and sex discrimination prohibited by the Fifteenth and Nineteenth Amendments. Beginning with *Minor v. Happersett*, 21 Wall 162 in 1875, where the Court said:

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of sufferage. If uniform practice, long continued, can settle construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be." p. 177-178.

and continuing, among others, with:

United States v. Cruikshank, 92 U.S. 542
United States v. Harris, 106 U.S. 629
Wiley v. Sinkler, 179 U.S. 58
Mason v. Missouri, 179 U.S. 328
Pope v. Williams, 193, U.S. 621
Guinn v. United States, 238 U.S. 347
Breedlove v. Suttles, 302 U.S. 277
Snowden v. Hughes, 321 U.S. 1
Lassiter v. Northhampton Board of Election, 360 U.S. 45

and ending with *Carrington v. Rash*, ... U.S. ...., 13 L.ed 2d 675, decided in March of this year, in the language of Mr. Justice Stewart:

> "There can be no doubt either of the historic function of the States to establish on a non-discriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, 'the States have long been held to have broad powers to determine the conditions upon which the right of sufferage may be exercised' . . . [citations

omitted] . . . In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." p. 677-678

Concurrent with that principle is the constitutional rule, of equal stature, that:

> "The Fifteenth Amendment does not confer the right of sufferage upon anyone." *United States v. Reese*, 92 U.S. 214, 217
>
> "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for protection for such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to sufferage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws, and not directly upon the citizen." *Minor v. Happersett*, supra, p. 171

Guinn v. United States, supra; *Pope v. Williams*, supra; *McPherson v. Blacker*, 146 U.S. 1.

The Act flies in the teeth of these traditional and basic Constitutional principles. In whatever posture viewed, §4, under the authority of the National Sovereign, effectively *grants the right to vote*, in all local, state and federal elections, to the Plaintiff's illiterate inhabitants over twenty-one, *a right specifically denied under her Constitution and laws.*[36]

This flagrant violation of the compact is not saved by its operation being related to a Congressional presumption of conduct in November 1964. In the apt language of this Court:

[36] Congressional legislation reducing the voting age to 14 could be no more unconstitutional.

"But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restriction . . ." *Bailey v. Alabama*, 219 U.S. 219, 239.

In short, Congress has no power by presumption or otherwise, to prevent South Carolina from imposing lawful qualifications for her electors, a function delegated and reserved to her by the Constitution.

Nor can it be contended that the literacy test eliminated by the Act is an unlawful qualification. Only six years ago this Court recognized the Sovereign's reasons, in the interest of better government, for requiring such tests, and sustained their constitutionality.

"The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color and sex as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society when newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate could exercise the franchise . . . [citations omitted] . . . It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of sufferage . . . [citations omitted] . . . North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by Constitutional standards." *Lassiter v. Northhampton Board of Elections*, 360 U.S. 45, 52-53.

Guinn v. United States, supra, p. 336.[37]

Similarly, in striking down her literacy test, the Act violates the right of South Carolina's inhabitants to have the votes of their electorate accorded equal weight. Through their lawful literacy test, they have chosen a literate electorate in the interest of achieving the best government. To require the votes of illiterates to be counted is to dilute and debase the voice of the literate electorate which they chose. In the language of Mr. Chief Justice Warren:

> "The right to vote freely for the candidate of one's choice is of the essence of a Democratic society, and any restrictions on that right strike at the heart of representative government. And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555.

The Fifth Amendment denies to Congress the right to dilute the sufferage rights of the Plaintiff's inhabitants, which she may not voluntarily so do under the Fourteenth Amendment.

But the Congress and President did not stop with simply granting certain inhabitants of South Carolina the right to vote by striking down her literacy test. The Act creates a system of Federal regulation for Plaintiff's entire election procedures. She may not change ". . . any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . ." without approval by the Defendant or the United States District Court for the District of Columbia.[38] The Defendant is free to send in Federal officials to register South Carolina inhabitants and oversee her elections, at times and places

[37] It is noteworthy that the Plaintiff's test is about the simplist that could be required. Complaint, Par. 12 and Exh. B, p. 20. See *Hearings*, H. R. 6400, Ser. No. 2, p. 30; *Hearings*, S 1564, Pt. 2, p. 1460-1469.

[38] §5 of the Act.
Presumably, South Carolina could not now, without such approval, voluntarily remove her literacy test.

and under procedures prescribed by Federal officials.[39] Under such circumstances the Plaintiff is required to conform to Federal standards for preserving and handling her election records.[40]

Even more significant, Federal criminal law invades the area of South Carolina's criminal election prohibitions, heretofore exclusively reserved to her. Without regard to any discrimination because of race, color or sex, the Act makes criminal under Federal law a broad spectrum of conduct designed to interfere with the right to vote, the right to register, the right to urge or aid any person to vote or register, or the right to have one's vote tabulated.[41] This conduct, made a major crime (felony), is condemned *in spite* of the belief of a state election official that his acts conform to federal and state laws. Thus he *refuses* anyone the right to register and vote at the risk of *personal* federal criminal conviction. Furthermore such conduct is made criminal even though the Acts of the wrongdoer could not be those "of the State" within the Fifteenth Amendment. These provisions apply to *all* elections, local and state, as well as federal.

On several occasions this Court has declared almost identical legislation in violation of the Constitution:

> "Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the Nation is directly interested, or in which some mandate of the National Constitution is disobeyed; . . ." *James v. Bowman*, 190 U.S. 127, 142.

And again, declaring such Congressional legislation void in the fresh perspective of the passage of the Fifteenth Amendment, this Court said:

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[39] §§6(b), 7, 9(b) of the Act.

[40] §12(b) of the Act.

[41] §§11 and 12 of the Act.
In addition, in elections for federal officials *only*, vote bribery and false registration is made a federal crime. If she has no such provision for local elections, the creation of such a crime by the State is prohibited, without Federal approval.

"It has not been contended, nor can it be, that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color or previous condition of servitude, that Congress can interfere and provide for its punishment. If, therefore, the third and fourth sections of the Act are beyond that limit, they are unauthorized." *United States v. Reese*, 92 U.S. 214, 218.

United States v. Harris, 106 U.S. 629; *Ex Parte Siebold*, 100 U.S. 371, 393.

If this legislation be held valid, in spite of its blatant violation of these, to date, established constitutional principles protecting the rights of Sovereign States, what are the limits of the National Sovereign with respect to the areas reserved to the States? In comparable era of civil rights struggle, eighty-five years ago, this Court said:

"The true interest of the people of this country requires that *both* the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. States rights and the rights of the United States should be equally respected. *Both* are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring the one, we should not allow our zeal to nullify or impair the other." *Ex Parte Seibold*, supra, p. 394 [Emphasis added]

III

EVEN IF CONGRESS WERE NOT PROHIBITED FROM ENACTING THIS LEGISLATION, THE ACT IS NOT "APPROPRIATE" AND THEREFORE VIOLATES THE FIFTEENTH AMENDMENT.

Aside from its obvious abrogation of the existing constitutional rights of South Carolina and her inhabitants,

the Act is not "appropriate" legislation to enforce the Fifteenth Amendment, as that Amendment specifically requires.[42] As strictly a Government of delegated powers with limited authority,[43] the National Soveregn can only legislate in a manner necessary and appropriate for the purposes sought to be accomplished—an indeterminate sweep across the rights of others is void.[44]

As this Court only last year courageously asserted in striking down legislation directed to known enemies of the Union:

> "[E]ven though the governmental purposes be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." *Aptheker v. Secretary of State*, 378 U.S. 500, 508.

In view of these principles the Act clearly does not comply with §2 of the Fifteenth Amendment, both as drawn and applied to South Carolina.

Existing legislation to enforce specific violations of the Fifteenth Amendment have existed for some time.[45] However, as Defendant and others testified before Congress, this legislation was designed to deal with "massive racial

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[42] No attempt will be made to repeat much of what has been said that is equally applicable here.

[43] "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States." *United States v. Cruikshank*, 92 U.S. 542, 551.

[44] *Smith v. California*, 361 U.S. 147; *Slochower v. Board of Education*, 350 U.S. 551; *Railroad Retirement Board v. Alton Rrd. Co.*, 295 U.S. 330, 374.

[45] *Civil Rights Acts of 1964, 1960 and 1957.* 18 U.S.C. 837, 1074, 1509; 20 U.S.C. 241, 640; 42 U.S.C. 1971, 1974-1975, 2000; 28 U.S.C. 1447; 5 U.S.C. 2204-2205.

discrimination" in the right to vote.[46] As such, however, according to the evidence before Congress, it does not purport to reach areas where such discrimination exists, in some of which the continued enforcement of literacy tests is permitted by the Act.[47] On the other hand, according to the Defendant, the Act applies to some innocent, as well as guilty, states and subdivisions.[48]

Yet the Act would be held "appropriate" because of a great and long-standing emergency need to correct violations of the Fifteenth Amendment. In more troublesome times than these, this Court has refused to push aside constitutional principles for such an excuse.

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority." *Ex Parte Milligan*, 4 Wall 2, 120[49]

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[46] See Footnotes 26 and 27, supra.

Actually most of the Act's criticism before Congress came from those objecting to its limited coverage. These objectors preferred a test, tied to registration percentages, which would authorize Federal Examiners to enforce fairly existing State law. See *Hearings*, H. R. 600, Ser. No. 2; *Hearings*, S 1564, Pt. 1. Query, a lesser remedy more constitutional, possibly overlooked in the Congressional haste to pass the Act? See opening remarks of Chairman Celler, *Hearings*, H. R. 6400, Ser. No. 2, p. 1-2.

[47] *Hearings*, H. R. 6400, Ser. No. 2, 68-69, 75-76, 89, 273-284, 362-364, 368-369, 373, 405, 418-421, 461-462, 508-518, 527-529, 674, 714; *Hearings* S 1564 Pt. 1, p. 246, 258, 339.

[48] *Hearings*, H. R. 6400, Ser. No. 2, p. 62, 105; *Hearings*, S 1564, Pt. 1, p. 20, 28, 62, 87, 86—also 28.

[49] For a similar statement in severely trying economic times see *Schecter Poultry Corp. v. United States*, 295 U.S. 495, 528-529.

Even so what is the "emergency" as to South Carolina? While she would not deny that there might have been incidents of a wrongful application of her election laws from time to time, she asserts that these practices have never in recent years been widespread, substantial, or "massive."[50] When such incidents have occurred, they have been voluntarily corrected by her political subdivisions, officials and inhabitants, as proven by the complete absence of any voter discrimination suits in South Carolina by the Defendant and his predecessors under existing legislation. The failure of the Defendant, to date, to send federal examiners into her borders under this Act is further evidence of this fact. Neither does South Carolina have any recent history of legislative attempts to deprive her inhabitants of the right to vote similar to that which this Court found in other Sovereign States.[51] The contrary is fact. See Appendix A.

What then is the basis of the Act being "appropriate" as to South Carolina? Before Congress, the Defendant charged that she stood guilty of racial discrimination in the operation of her schools, transportation and parks.[52] As heretofore indicated, to be "appropriate" the Act must be an exercise of the Fifteenth Amendment powers which it purports to enforce, not those of the Fourteenth Amendment.

Even so this Court's attention is directed to those grounds. The educational laws to which the Defendant referred were declared unconstitutional in 1954,[53] and on August 1, 1965, prior to the Act's passage, 103 of South Carolina's 108 school districts had filed "compliance plans" with the United States Department of Health, Education and Welfare.[54] The transportation laws to which the Defendant referred state the old "separate but equal" doc-

[50] Surely the long-past conduct of her prior government cannot now make this legislation constitutional. Compare the reasoning of Mr. Justice Black dissenting in *Bell v. Maryland*, 378 U.S. 226, 234.

[51] *United States v. Louisiana*, supra, *United States v. Mississippi*, supra.

[52] *Hearings*, H. R. 6400, Ser. No. 2, p. 38-39; *Hearings*, S. 1564, Pt. 2, p. 1493-1496.

[53] §21-751, 1962 Code of Laws, South Carolina; *Brown v. Board of Education*, 347 U.S. 483.

[54] From the public records maintained in the office of the South Carolina Superintendent of Education.

trine for railroads and steamships and have not been observed for years.[55] Racial restrictions for her public parks were removed in 1964.[56]

Thus, in view of its application to the innocent, its failure to reach areas where known voter racial discrimination exists, and the absence of any "need" for its application to South Carolina, the Act is not "appropriate" legislation as required by the Fifteenth Amendment.

IV

THE ACT IN DEPRIVING THE PLAINTIFF AND HER INHABITANTS OF THEIR CONSTITUTIONAL RIGHTS SOLELY BECAUSE OF THE FAILURE OF CERTAIN OF HER ELECTORATE TO VOTE IN NOVEMBER 1964, IS A BILL OF ATTAINDER AND *EX POST FACTO* LAW PROHIBITED BY ARTICLE I, §9 OF THE CONSTITUTION OF THE UNITED STATES AND FURTHER CONSTITUTES AN UNLAWFUL ATTEMPT BY CONGRESS TO EXERCISE POWERS EXCLUSIVELY RESERVED TO THE JUDICIARY UNDER ARTICLE III OF THE CONSTITUTION.

Until the passage of this Act, the only legal consequence which flowed from the failure of any specific number of South Carolina's registered voters to vote in a given election was the victory of the successful candidate. This was the law and the sole consequence on November 3, 1964 when 32% of her registered voters chose not to vote in the Presidential contest. Yet on August 6, 1965 the Congress and the President, through this Act, attempted to deprive South Carolina, indefinitely, of the right to prescribe reasonable

[55] §58-714, 1962 Code of Laws, South Carolina.
In this connection the Court should understand that South Carolina's Constitution requires a re-codification of her laws every ten years. Article VI, §5 Constitution of 1896. As a practical matter, the Code Commissioner, charged with this duty, often carries forward, in each re-codification, existing Code provisions not directed to be deleted by intervening acts of the legislature. The existence in the Code does not mean that they are the law of South Carolina. *Gamble v. Clarendon County*, 188 S.C. 250, 198 S.E. 857; *Ridgill v. Clarendon County*, 188 S.C. 460, 199 S.E. 683.

[56] §51-2.1-2.4, 1962 Code of Laws, South Carolina, 1965 Supplement. See *Brown v. S. C. State Forestry Commission*, 226 F. Supp. 646 (E.D.S.C. 1963).

qualifications for her electors and generally control her elections, at all politicial levels solely because over 50% of her electorate so chose not to vote.

Such invidious legislation has not heretofore survived the scrutiny of this Court. Speaking through Mr. Justice Black this Court struck down a similar Congressional act, as a Bill of Attainder and *ex post facto* law, which was designed to deprive certain individuals of future government employment, saying:

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . .
>
> "When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *United States v. Lovett*, 328 U. S. 303, 317-318.

The Court relied heavily on its previous decisions in *Cummings v. Missouri*, 4 Wall 277 and *Ex Parte Garland*, 4 Wall 333, saying:

> "They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial are bills of attainder prohibited by the Constitution." p. 315

There can be no doubt that the Act applies specifically to South Carolina and to certain other Sovereigns as if named therein.[57] Neither is there any doubt that the Act invokes a "punishment". Certainly the deprivation of the

[57] The entire legislative history of the Act makes it amply clear that Congress knew exactly which states would be covered. See, eg., *Hearings* H. R. 6400, Ser. No. 2, p. 29; *Hearings*, S 1564, Pt. 2, p. 1458-1461.

rights of a Sovereign State and her inhabitants to exercise basic constitutional rights essential to their government is more severe than the denial of future federal employment[58] or the right to practice in the Federal courts.[59]

Neither is this fatal nature of the Act cured by the opportunity it grants the Plaintiff to "purge" herself by proof in the District of Columbia of the absence of discrimination for five previous years. In view of the arbitrary basis for the Act's application, this Court's reply to a similar argument is most appropriate.

> "The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties." *Cummings v. Missouri*, supra, p. 328

For the same reasons the Act constitutes an attempt by Congress to exercise judicial powers. The distinction from legislative functions is clear:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, *to be applied thereafter* to all or some part of those subject to its power." *Prentice v. Atlantic Coast Line Company*, 211 U. S. 210, 226 [Emphasis added]

The Act attempts to adjudge South Carolina guilty because of previous lawful conduct.

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[58] *United States v. Lovett*, supra.

[59] *Ex Parte Garland*, supra.

"Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. . . ." *Manley v. Georgia*, supra, p. 5-6

See *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86-87. As the author of the *Lovett* decision stated:

". . . .[F]or the crime of communism, like all others, can be punished only by court and jury after a trial with all judicial safeguards." *Barenblatt v. United States*, 360 U. S. 109, 160 (Dissenting opinion)

There is no room in a constitutional republic for such arbitrary and invidious legislation.

CONCLUSION

For the foregoing reasons, South Carolina requests that permission to file her Complaint be granted, and that she be awarded the relief requested therein.

Respectfully Submitted,

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September 1965

APPENDIX A

PERTINENT CHANGES IN THE CONSTITUTION AND LAWS OF SOUTH CAROLINA REGULATING GENERAL ELECTIONS IN RECENT YEARS

1. South Carolina Constitution of 1896

Though the changes have not been frequent, they are significant.

a. ARTICLE II, §4(a). Residence requirements

In order to register to vote, this provision originally required the applicant to have resided in the State two years, in the County one year and in his polling precinct four months. An exception for ministers and teachers required only six months residence in the State. The applicant was required to have paid all due poll taxes six months prior to registration.

In 1930, an amendment removed all references to poll taxes. 1931 Stat. (37), 105.

In 1958, an exception was added reducing to six months the residence requirements for the spouse of ministers or teachers.

In 1964, residence requirements were reduced to one year in the State, six months in the County and three months in the precinct.

b. ARTICLE II, §4(e). Poll Taxes

This provision originally required the proof of payment of all poll taxes as a prerequisite to registration.

In 1930, in conjunction with the amendment of ARTICLE II, §4(a) above, a provision was inserted to require proof of such taxes having been paid over thirty days prior to registration. (These changes reduced the period from six months to thirty days.) 1931 Stat. (37) 105

In 1950, the requirement of proof of payment of poll taxes as a prerequisite to register was eliminated. 1951 Stat. (47) 34

c. ARTICLE II, §10. Primaries

This section originally provided that the General Assembly should provide for the regulation of party primaries.

It was repealed in 1944. 1945 Stat. (44) 10

Each of these Constitutional amendments were reflected in appropriate statute changes.

2. Statutes

In 1896, in conjunction with the adoption of a new Constitution, the legislature adopted a new election code, which for the most part simply adopted the Constitutional provisions. County Commissioners to supervise elections were established, directed to open the polls on election days from 7:00 A.M. to 4:00 P.M. and to provide paper ballots. 1896 Stat. (22) 29. Otherwise Commissioners were generally left free to administer the elections.

County Boards of Registration were established and the Secretary of State directed to furnish them appropriate registration books and forms. The registration books were to be opened the first Monday in each month and for three successive days (during election years) and closed thirty days before each election, except with respect to those coming of age in this period, who could be registered. Provision was made for the form of the registration certificate, the individuals removal from one precinct to another, and for replacing lost or destroyed certificates. Appeal to the Clerk of Court and the Courts was provided for a refusal to register. Registration every ten years, beginning in 1898, was required. 1896 Stat. (22) 33, *et seq.*

Changes:

(1) With one exception, no major pertinent changes made until 1950.

In 1944 Catawba Indians were granted the right to vote, if otherwise qualified. 1944 Stat. (43) 1208

(2) In 1950, a new election law covering general

elections and primaries was enacted. 1950 Stat. (46) 2059. While some of the old provisions were retained, many pertinent changes and new provisions were added.

(a) Polls were required to be open from 8:00 A.M. to 6:00 P.M.

(b) A minimum number of booths were required, depending upon the number of residents registered in the precinct. Similar requirements for boxes, numbers of ballots, guard rails and managers' tables were added.

(c) Maximum time for the occupancy of a booth or voting machine was stipulated.

(d) Specific procedures for assisting disabled voters were provided.

(e) Persons in line when the polls closed were allowed to vote.

(f) Copies of Constitutional amendments were required to be posted at the polling place.

(g) Voting machines were authorized. Provision was made for their inspection, for instruction in their use and assistance when needed, and for their custody, repair, etc.

(h) Criminal penalties for fraudulent registration, vote bribery and for many forms of election violations and the prevention of voting were extended.

(i) No person was to be disqualified because of the receipt of public welfare or aid.

(j) An applicant for registration was required to take an oath to the effect that he met the Constitutional qualifications. 1951 Stat. (47) 78

(3) In 1953 provisions were added for absentee voting and registration for members of the Armed Forces, Merchant Marines and overseas employees of Red Cross and United States Government. 1953 Stat. (48) 423

(4) In 1957 a uniform application form for registration was provided. 1957 Stat. (50) 671. See Complaint, Ex. B, p. 20

(5) In 1958, disabled, but otherwise qualified registration applicants were permitted to sign the form by their mark, with registrar assistance. 1958 Stat. (50) 1591

(6) In 1960 absentee voting and registration was expanded to include the spouse of covered citizens. 1960 Stat. (51) 1598

(7) In 1965, hours for the opening of polling places were expanded to from 8:00 A.M. to 7:00 P.M. 1965 Stat. (....) 466

APPENDIX B

Constitutional Provisions and Voting Rights Act of 1965

1. Pertinent Sections of Constitution of United States.

a. Article I, Sec. 2.

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

b. Article I, Sec. 4.

The times, places and manner of holding elections for Senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

c. Article I, Sec. 9, Clause 3.

No bill of attainder or ex post facto law shall be passed.

d. Article III, Sec. 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

e. Article IV, Sec. 2.

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

f. Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

g. Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the the states, are reserved to the states respectively, or to the people.

h. Fourteenth Amendment.

§ 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3.

No person shall be a Senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

§ 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5.

The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

i. Fifteenth Amendment.

§ 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2.

The Congress shall have power to enforce this article by appropriate legislation.

j. Seventeenth Amendment.

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such

vacancies: *Provided,* That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

k. Nineteenth Amendment.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce the provisions of this article by appropriate legislation.

2. VOTING RIGHTS ACT OF 1965

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965".

Sec. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Sec. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order

if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of and final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided*, That

such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within in sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

Sec. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United

States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use

of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Sec. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts

are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: *Provided*, That the commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

Sec. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and

transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided*, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision

for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

Sec. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United Statese court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United

States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Sec. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the

fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such

payment under State law, together with the name and address of the applicant.

Sec. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimdiate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any power or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact,, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the

same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11 (a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10 or 11 (a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not

been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

Sec. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may peti-

tion the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

Sec. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court

for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

Sec. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

Sec. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

Sec. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

Sec. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

Sec. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 22, Original

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

MEMORANDUM FOR THE DEFENDANT

On September 29, 1965, the State of South Carolina filed with the Court a motion for leave to file a complaint invoking this Court's original jurisdiction. The complaint, which names the Attorney General of the United States as the defendant, challenges the constitutionality of the Voting Rights Act of 1965 and seeks a decree enjoining the principal provisions of the Act.

For the reasons stated in the brief of the United States in support of its motions for leave to file original complaints and for expedited consideration, filed with the Court this day in *United States* v. *Alabama, United States* v. *Mississippi,* and *United States* v. *Louisiana,* Nos. —, —, and —, Original, this Term, we believe that the Court has jurisdiction to entertain

790-874—65

this original action[1] and may appropriately exercise its jurisdiction here. Accordingly, we do not oppose Souh Carolina's motion for leave to file its complaint.

As pointed out in our brief in the other cases, note 5, pages 16–17, this Court, if it accepts jurisdiction here, might ultimately dispose of the case without reaching the merits of the constitutional issue on the ground that the question is premature because South Carolina has an adequate alternative remedy in the United States District Court for the District of Columbia by seeking exemption from the substantive requirements of the Voting Rights Act. This suggestion, however, does not affect the jurisdiction of this Court to entertain the complaint tendered by South Carolina. Nor do we imply that the propriety of such a disposition should be determined in advance of full argument.

---

[1] The original jurisdiction of this Court here, too, is predicated on Article III, Section 2, Clause 2. Federal jurisdiction is premised on the portion of Clause 1 of the same Section that extends the judicial power of the United States to "Controversies * * * between a State and Citizens of another State." Attorney General Katzenbach is a citizen of New Jersey. See *Alabama* v. *United States*, 373 U.S. 545. We construe Section 14(b) of the Voting Rights Act (which provides that actions to challenge the Act's constitutionality shall be brought in the United States District Court for the District of Columbia), like Section 12(f) (which vests jurisdiction to enforce the Act in the district courts) as not intended to deprive this Court of jurisdiction of appropriate original actions challenging the Act's constitutionality, in view of the constitutional basis of this Court's original jurisdiction. Brief, n. 1, p. 8. At all events, the Court may grant the State's motion for leave to file a complaint without now resolving the question of jurisdiction, which can properly be postponed to the time when the case is considered on the merits.

The somewhat expedited procedure which we have suggested with respect to the original actions filed by the United States against the States of Alabama, Mississippi and Louisiana is, we think, equally appropriate here. We are further advised that the State of South Carolina favors an expedited consideration of the cause.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

OCTOBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

NO. 22, ORIGINAL

IN THE

Supreme Court of the United States

October Term 1965

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

On October 21, 1965 the Solicitor General filed a Memorandum return to the Motion of South Carolina for permission to file her Complaint in which he declined to oppose the Motion. In so doing he made several observations which we feel merit a reply.

1. EXPEDITION

Upon receipt of the directive of the Attorney General of August 7, 1965 (Exh. F-2, Complaint p. 33-34), the Registration Boards of South Carolina's forty-six counties suspended her literacy test. Since that date applicants in large numbers have been registered without any literacy requirement in violation of her Constitution and laws.[1]

[1] As this Reply went to press, the Attorney General announced that during the week of November 1-7, 1965, he was sending federal examiners into two South Carolina counties, Dorchester and Clarendon. This action was taken not because of the administration of any literacy requirement in connection with registration, but because the officials in those counties refused to open the registration books a sufficient number of days per month to satisfy the defendant, although the State law requires the books to be opened only one day per month in nonelection years. See Appendix A, p. 5.

In June of 1966, South Carolina will hold a major statewide primary (Democratic) in which many important federal, state and county offices will be at stake.[2] Unless the eligibility of the illiterates registered since August 7, 1965 to vote in that primary has been finally determined, the results of these races will undoubtedly be challenged and become hopelessly entangled. A determination by this Court that the provisions of the Act challenged are unconstitutional would permit the names of these illiterates to be purged in advance of the primary.

For these reasons South Carolina joins in the request of the Solicitor General that this proceeding be treated expeditiously.[3]

2. "ALTERNATE REMEDY"

In his Memorandum, p. 2, and Brief, note 5, pp. 16-17 in *United States v. Alabama*, No. 23, Original, *United States v. Mississippi*, No. 24, Original, *United States v. Louisiana*, No. 25, Original, the Solicitor General suggests that South Carolina has an "adequate alternate remedy" to a challenge of the constitutionality of the Act by instituting a proceeding in the United States District Court for the District of Columbia under §4(a) of the Act, (Complaint, p. 82) for a determination that she has been free of discrimination for the previous five years. We concur with the further suggestion of the Solicitor General that such a

[2] Among others, the offices up for election include two United States Senators, Governor, Lieutenant Governor, Attorney General, twenty-three county Senators and all members of the South Carolina House of Representatives.

[3] In view of his request, we are somewhat at a loss to understand the Solicitor General's suggestion that the Court need not reach the merits of this action, and his effort to bring Alabama, Mississippi and Louisiana into the original jurisdiction of the Court over the apparent opposition of each of these States (Complaint, Original No. 23, p. 5-6; Complaint, Original No. 24, p. 5-6; Complaint, Original No. 25, p. 5-6). The conflicts between the allegations contained in these three Complaints and the allegations in the state court actions, attached thereto, indicate factual issues in these causes, issues which may delay final adjudication therein. Yet the Solicitor General's suggestion that this cause might be dismissed because of an alleged remedy available in the District Court of the District of Columbia and his efforts to expedite hearings in this Court in Original Nos. 23, 24 and 25 may well result in delaying the constitutional test beyond the term.

The Complaint in *South Carolina v. Katzenbach*, No. 22, Original presents the basic constitutional questions free of factual issues.

disposition should not be determined in advance of a full hearing in view of the importance of the questions raised and the possible disastrous effects of a further delay. However we believe that his suggestion warrants brief comment at this stage.

a. Sect. 4(a) affords no alternate remedy to South Carolina. On its face, the necessary certificates having been issued, the Act automatically suspended South Carolina's literacy test and pursuant to the Defendant's direction she has been registering illiterates since August 7, 1965. If she is now directed to the United States District Court for the District of Columbia, the most that that Court can declare is that her literacy test and freedom to iegislate are no longer thereafter suspended. Sect. 4(a), Complaint, p. 82. Meanwhile her voter registration rolls will contain the names of thousands of illiterates registered in violation of her laws and Constitution.

There is no provision in the Act authorizing South Carolina to go back and purge the names of these illiterates from her rolls as a result of such a decision by the United States District Court for the District of Columbia. The constitutionality of the Act will not have been determined, so possibly their registration would have been legal. Yet they would not be qualified *electors* entitled *to vote* under South Carolina law. Thus, the possible chaotic conditions would still arise in the June 1966 primaries.

In short, a constitutional determination of whether the challenged portions of the Act are inoperative, null and void, or are valid, is essential to the future conduct of South Carolina's elections.[4]

b. The "remedy" set forth in §4(a) is itself an inherent and essential part of the sections of the Act challenged as unconstitutional. The very sentence of §4(a) which per-

[4] Of course if South Carolina had refused to register illiterates pending a determination by the United States District Court in the District of Columbia, she would not face this dilemma and §4(a) would afford an alternate remedy. But this was not the course of action which the Defendant directed, nor that which South Carolina followed.

mits recourse to the District of Columbia courts, creates the arbitrary and irrebuttable presumption as to the Plaintiff's conduct and "triggers" the other sections of the Act which deprive her of her sovereign powers and her citizens of their constitutionally protected rights. It is among the essence of South Carolina's positions in this cause that Congress cannot, in the manner sought, require her to resort to this "remedy" in order to be free to conduct her elections in accordance with her lawful Constitution and statutes.

A determination of the constitutionality of the "remedy" necessarily involves a determination of the validity of many of the objectionable portions of the Act. This is the very question which South Carolina seeks to have resolved here.

c. For the reasons set forth in her Brief at page 57, South Carolina also contends that this "remedy" deprives her citizens of due process, to which they may not be required to resort without a prior constitutional determination.

Respectfully submitted,

DANIEL R. MCLEOD
Attorney General
State of South Carolina
DAVID W. ROBINSON
DAVID W. ROBINSON, II
Special Counsel

ROBINSON, MCFADDEN & MOORE
OF COUNSEL

November 1965

APPENDIX A

Pertinent Provisions, 1962 Code of Laws of South Carolina

§ 23-63. Opening registration books at courthouse.—The books of registration shall be opened on the first Monday of each month, at the courthouse, for the registration of electors entitled to registration under the Constitution and under § 23-62, and, during election years, shall be kept open for three successive days in each month. In every general election year, when the registration books are opened in the months of May and August, they shall be kept open continuously every day except Sunday, at the courthouse, up to and including the fifteenth days of such months. (1952 Code § 23-63; 1950 (46) 2059.)

§ 23-65.1. Additional days and hours for registration.—Notwithstanding the provisions of § 23-53, boards of registraiton shall remain open as now provided by law, and in addition thereto, shall remain open and available for registration on any additional days and during such hours as the boards may determine. Due notice of the time and place shall be given by publication in a newspaper of general circulation in the county at least one week in advance. (1957 (50) 671.)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 22, ORIGINAL

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

ANSWER

Nicholas deB. Katzenbach, Attorney General of the United States, for his answer to the Complaint herein:

1. Admits the allegations of the first, second, third, and fourth paragraphs of the Complaint.

2. Admits the allegations of paragraph 5 of the Complaint except denies that under the United States Constitution the prescription of registration and voting procedures for the inhabitants of South Carolina is within the exclusive province of the Plaintiff.

3. Admits, in response to paragraph 6 of the Complaint, that the Congress of the United States, acting under authority of the Fifteenth Amendment and of other provisions of the Constitution of the United States, enacted and the President of the United States on August 6, 1965, approved the Voting Rights Act of 1965, P.L. 89-110, and that Plaintiff has a

justiciable interest with respect to the application of the Voting Rights Act of 1965 (hereinafter called the Act), to registration and voting by the citizens of South Carolina.

4. Admits the allegations of paragraph 7 of the Complaint except denies the implication that the Act unconstitutionally dilutes the weight or value of the vote of Plaintiff's electorate.

5. Alleges insufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 8 of the Complaint, but admits that Plaintiff is a proper party to this action.

6. Admits the substantial accuracy of the statistics set forth in the first and fourth columns of Exhibit A to the Complaint, referred to in paragraph 9 of the Complaint, but alleges insufficient knowledge or information at this time to form a belief as to the accuracy of the other statistics set forth in Exhibit A.

7. Denies the allegations of paragraph 10 of the Complaint, but admits that the Act as applied to Plaintiff suspends for a time Plaintiff's power to administer qualifications for registration and rules for the conduct of federal, State, and local elections.

8. Admits, in response to paragraph 11 of the Complaint, that Plaintiff's constitution and laws require all applicants for voting registration to complete a written registration application substantially similar to that annexed as Exhibit B to the Complaint and require every applicant who does not satisfy a property qualification to demonstrate that he can both read and write any section of the State constitution submitted to him by the registrar, but alleges insufficient

knowledge or information at this time to form a belief as to the truth of the allegations with respect to the administration of the literacy test and registration form requirement.

9. Admits the allegations of paragraph 12 of the Complaint insofar as they set forth prerequisites for registration and voting established by Plaintiff's constitution and laws, but alleges insufficient knowledge or information to form a belief as to the truth of the allegation that such prerequisites materially affected the number and percentage of Plaintiff's inhabitants who participated in the election of November 3, 1964.

10. Admits the allegations of paragraph 13 of the Complaint insofar as they allege the requirement under Plaintiff's constitution and laws that Plaintiff's citizens must re-register or re-enroll every ten years to be eligible for continued voting and that the most recent such re-registration or re-enrollment occurred in 1957, but alleges insufficient knowledge or information to form a belief as to the truth of the allegation that the requirement of such re-registration or re-enrollment materially affected the number and percentage of Plaintiff's inhabitants who participated in the election of November 3, 1964.

11. Admits the substantial accuracy of the statistics set forth in the first and fourth columns of Exhibit C–1 to the Complaint, referred to in paragraph 14 of the Complaint, except the figure indicated for 1948 in the fourth column, but alleges insufficient knowledge or information at this time to form a belief as to the accuracy of the other statistics set forth in Exhibits C–1 and C–2 and alleges insufficient knowledge or in-

formation to form a belief as to the truth of the other allegations of paragraph 14 of the Complaint.

12. Admits the substantial accuracy of the statistics set forth in Exhibits D–1 and D–2 of the Complaint, referred to in paragraph 15 of the Complaint, but alleges insufficient knowledge or information to form a belief as to the truth of the other allegations of paragraph 15.

13. Denies the allegations of paragraphs 16 and 17 of the Complaint.

14. Alleges insufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 18 of the Complaint.

15. Alleges insufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 19 of the Complaint, but denies that Plaintiff or her political subdivisions are "conclusively" presumed to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color and denies that the Act creates any "irrebutable" presumption with respect to Plaintiff.

16. Admits the allegations of paragraph 20 of the Complaint.

17. Denies, in response to paragraph 21 of the Complaint, that less than 50 per centum of the citizens over 21 years of age resident in Aroostook County, Maine, voted on November 3, 1964, and alleges that the Act has been invoked and applied by the United States with respect to Elmore County, Idaho, and every other State and political subdivision determined as of this date to fall within the terms of the Act.

18. Denies the legal conclusions set forth in paragraphs 22, 23, 24, 25, 26 and 27 of the Complaint, denies that the Act as applied to Plaintiff is unconstitional in any respect, denies that the Act is an inappropriate exercise of the powers granted Congress by the Fifteenth Amendment to the Constitution, denies that the Act creates any irrebutable presumption with respect to Plaintiff, her political subdivisions, officials or residents, but admits—

(a) that certain of the Act's restrictions and prohibitions are made applicable only to those States and political subdivisions which are determined by the Attorney General to have maintained on November 1, 1964, any test or device (as defined in the Act) as a prerequisite for voting or registration for voting and with respect to which the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or voted in the presidential election of November 1964;

(b) that the Act suspends Plaintiff's authority to prescribe or administer, as a qualification for the registration of her inhabitants for voting, any literacy tests until plaintiff has obtained a declaratory judgment that no such test or device has been used during the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race or color as provided in Section 4(a) of the Act;

(c) that the Act suspends Plaintiff's power to amend or administer as amended any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from

that in force or effect on November 1, 1964, until and unless such qualification, prerequisite, standard, practice or procedure has been submitted to the Attorney General and the Attorney General has not interposed an objection thereto or the Plaintiff has obtained a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color as provided in Section 5 of the Act or unless and until the Plaintiff has obtained a declaratory judgment as provided in Section 4(a) of the Act;

(d) that certain provisions of the Act apply to all of the Plaintiff's political subdivisions, even though some exceeded the registration and voting percentage quotas provided in the Act;

(e) that certain provisions of the Act provide that certain actions with respect to qualifications for registration and voting may be commenced solely in the United States District Court for the District of Columbia; and

(f) that the Act grants to certain of the Plaintiff's inhabitants the right to register and vote notwithstanding their non-compliance with certain tests and devices prescribed by Plaintiff.

Wherefore, Defendant prays that the Court sustain the constitutionality of the Voting Rights Act of 1965 and deny the relief sought by the Plaintiff.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER, 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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FILE
DEC 17
JOHN F. DAVIS,

NO. 22, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

STATE OF SOUTH CAROLINA,

Plaintiff

versus

NICHOLAS deB. KATZENBACH,
Attorney General of
the United States,

Defendant

AMICUS CURIAE BRIEF OF STATE OF ALABAMA

RICHMOND M. FLOWERS
Attorney General
State of Alabama

GORDON MADISON
Assistant Attorney General
State of Alabama

State Administrative Building
Montgomery, Alabama

NO. 22, ORIGINAL

IN THE

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the United States,

Defendant

AMICUS CURIAE BRIEF OF STATE OF ALABAMA

The State of Alabama with permission from the State of South Carolina desires to join in the briefs filed by the State of South Carolina in this case.

In addition, the State of Alabama files this amicus curiae brief for the court's consideration.

QUESTIONS TO BE CONSIDERED

1. Is there a denial of Fair Play or Due Process requirements by the provisions of Section 9 of the Voting Rights Act of 1965?

Under Section 7(b) of the act, the examiner certifies a list of applicants found qualified to the appropriate election official and to the Attorney General of the state at least once a month.

The act is silent as who may challenge the list.

The examiners in Alabama, by way of illustration, have certified thousands of Negroes who cannot read and write as qualified to vote.

State law provides that one must be able to read and write before being eligible or qualified to register and vote.

Two affidavits as to each person challenged must be submitted under Section 9 within the ten days provided as the time within which to challenge the eligibility of the person certified by the examiner as being qualified.

It is impossible for the office of the Attorney General of a state or the proper election officials mentioned in 7(b) of the act, or anyone else, to prepare the thousands of affidavits required before any challenge will be entertained. It is to be noted that the affidavits must be from people who have personal knowledge of the facts.

If thousands who cannot read and write have been certified as qualified by federal examiners in a month's time, one must secure twice that number of affidavits within ten days from persons who personally know that they cannot do so.

The above presents a procedure for challenging the acts of the federal examiners which is impossible under the mass examinations already conducted by the federal examiners.

When this is considered along with the appeal provisions to

the United States Court of Appeals appearing in Section 9, and Section 14(b) relative to jurisdiction only in district courts in the District of Columbia, it clearly appears that the affected states are intentionally being deprived of their rights, or those rights substantially impaired by means of procedures which do not meet Due Process or Fair Play requirements.

2. Does the act violate state power to fix the qualifications for registering and voting?

Again using the State of Alabama as an illustration, Section 181 of the Constitution of Alabama, as amended by Amendment 91, ratified December 19, 1951, provides in plain language that " . . . . No persons shall be entitled to register as electors except those of good character . . . ." Yet this provision of the State Constitution is nullified by 4(c)(3) of the Voting Rights Act of 1965, which also in plain words says a state may not require an elector to "possess good moral character." The Alabama courts have considered "good character" as "good moral character." *Opinion of the Justices*, 252 Ala. 351, 40 So.2d 849.

By way of further illustration, Section 181, supra, of the State's Constitution provides that one to become an elector must be able to read and write in the English language any article of the United States Constitution which may be submitted to him by the registrars.

The requirement that one must be able to read and write is always enforced, and some registrars require that an applicant read and write an article of the United States Constitution, as above provided. It is rare indeed for anyone who has no physical disability and who cannot read and write to be registered as an elector since the adoption of Amend-

ment 91, supra. If one be so registered by design or mistake, he may be purged from the lists under *United States v. Atkins*, 323 F.2d 733.

The defendant in this case construes and applies the act by his own admission as nullifying or suspending the state requirement that one must be able to read and write as a condition to becoming an elector. The result is that some twenty thousand persons who cannot read and write have been erroneously certified as qualified under state law in the State of Alabama.

The Voting Rights Act of 1965 and such procedure clearly violate the constitutional rights of states to prescribe the qualifications of their voters.

3. Some states affected by the Voting Rights Act of 1965 provide that any person making application to the board of registrars for registration who fails to establish by evidence to the reasonable satisfaction of the board of registrars that he or she is qualified to register may be refused registration. Title 17, Section 33, Code of Alabama 1940. *Williams v. Wright*, 249 Ala. 9; *Hawkins v. Vines*, 249 Ala. 165.

State law requires in some states that such applicant must be able to read and write.

Is the said Voting Rights Act unconstitutional in authorizing federal examiners to register or certify applicants as qualified who cannot read and write, thereby violating the constitutional rights of states to fix voter qualifications?

4. Whether the Voting Rights Act of 1965 violates the constitutional rights of the plaintiff and other affected states and their inhabitants under Article I, Sections 2, 4 and 9; Article III; Article IV, Section 2; Fifth Amendment, Fif-

teenth Amendment, and Seventeenth Amendment to the Constitution of the United States?

5. Whether the Voting Rights Act of 1965 is applicable to the State of South Carolina and whether said act is unconstitutional as written or applied?

These latter two questions have been briefed, and forceful arguments presented by the states of South Carolina and Louisiana.

The State of Alabama likewise claims that said act is unconstitutional as written and as applied (See Response of Alabama, No. 23 Original).

A repetition of the reasons advanced serves no useful purpose, the arguments of South Carolina and Louisiana are more than adequate to show the unconstitutionality of the 1965 Act; cases are pending in federal courts in Alabama in which this state is a party; full factual proof will be there made.

In conclusion, the State of Alabama must ask one question. Does the Voting Rights Act of 1965 prohibit a state from requiring an applicant for registration to answer orally under oath whether he or she can read and write, such being a state requirement?

Respectfully submitted,

RICHMOND M. FLOWERS, As
Attorney General of the
State of Alabama

GORDON MADISON, As Assistant
Attorney General of the
State of Alabama

CERTIFICATE OF SERVICE

I, Gordon Madison, one of the attorneys of record for the State of Alabama and duly qualified and admitted to practice in the Supreme Court of the United States, hereby certify that I have on this the ____ day of December, 1965, served a copy of the foregoing Amicus Curiae Brief on Honorables Nicholas deB. Katzenbach, Attorney General; Thurgood Marshall, Solicitor General; and John Doar, Assistant Attorney General, Attorneys for Defendant, by mailing a copy, airmail, postage prepaid, to each of them at Department of Justice, Washington, D. C. 20530; and also by serving a copy as aforesaid upon Honorables Daniel R. McLeod, Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina; David W. Robinson and David W. Robinson II, Special Counsel, P. O. Box 1942, Columbia, South Carolina, Attorneys for Plaintiff.

GORDON MADISON, As
Assistant Attorney General of
Alabama

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965.

No. 22 Original

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

NICHOLAS de B. KATZENBACH, Attorney General of the United States,

Defendant.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE.

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Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965

No. 22 Original

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

NICHOLAS de B. KATZENBACH, Attorney General of the United States,

Defendant.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE.

The State of Illinois, by William G. Clark, Attorney General of Illinois, respectfully submits its brief on the merits as *amicus curiae.*

I.

THE INTEREST OF THE STATE OF ILLINOIS

Pursuant to the invitation of this Court on November 5, 1965, the State of Illinois respectfully submits its interest as follows.

The most fundamental right of the citizens of the State of Illinois and of the citizens of all the states of the United

States is their collective determination and selection of their representatives who make laws. If this right is abridged or diluted by any means, a true expression of the ideals and aspirations of our citizenry cannot be achieved. It is imperative that every citizen be given the opportunity to vote on all questions which may be presented to the general electorate. To deny this right will substantially weaken the fundamental strength of our nation.

On March 5, 1869, Illinois was the third state to ratify the Fifteenth Amendment, less than one month after its proposal. Illinois was the first state to ratify the Nineteenth Amendment on June 10, 1919. Illinois was also the first state to ratify the Twenty-Fourth Amendment on November 14, 1962. Historically and by tradition, the State of Illinois has been in the forefront of legislative acts which have strengthened the voting rights of citizens, and is most sensitive to any incursion or abridgement of this right. The State of Illinois, therefore, is honored to participate in this case in support of the constitutionality of the Voting Rights Act of 1965.

II.

ARGUMENT.

The Voting Rights Act of 1965 as introduced, reported, passed, and approved is primarily intended to enforce the Fifteenth Amendment to the Constitution of the United States. Like every enactment of Congress, it comes before this Court with weighty presumptive validity, and that validity is not, we submit, overborne by any claim urged against it.

The command of the Fifteenth Amendment is unequivocal and its equal force upon state government and the Federal government is unarguable. That amendment reads:

> "The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (Amend. XV § 1)
>
> "The Congress shall have power to enforce this article by appropriate legislation." (Amend. XV § 2)

Hence, expressly delegated to the Congress by the people and by the States, is the power to enact legislation to prevent the denial or abridgement of the right to vote on account of race or color. This Court has so stated in *James* v. *Bowman,* 190 U. S. 127, at 138-139, quoting *United States* v. *Reese,* 92 U. S. 214, 217:

> "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from

> voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

The power and authority of Congress to enact a law to protect the voting rights of all citizens from discrimination because of race or color is thus established.

The question then becomes whether this act is an appropriate exercise of that Congressional power.

In the case of *Ex Parte Virginia*, speaking of the three postwar amendments, this Court said:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (100 U. S. at 345-346).

Therefore the act in question is appropriate if it is designed to prevent discrimination on account of race or color in the exercise of the right to vote.

To address oneself to the appropriateness of legislation is to make relevant the "legislative facts" in an inquiry

otherwise free of factual issues. "But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States* v. *Carolene Products,* 304 U. S. 144, 154.

Here the legislative record is ample indeed and these facts clearly obtain: in widespread areas of several states tests and devices as defined in the Act have been effectively used to deny or abridge the right to vote on account of race or color. House Report No. 439 and the Joint Views of 12 Members of the Judiciary Committee relating to the Voting Rights Act of 1965, reported, respectively, in the U. S. Code Congressional and Administrative News September 5, 1965, No. 10, pages 2507-2518 and pages 2610-2624 effectively detail the testimony heard and the documentary material submitted to develop the record, a recitation of which would be merely cumulative or repetitive. However, based on those legislative facts the conclusion was that, where there is coincidence of low registration or voting and the use of "tests and devices", the former is the result of racial discrimination in the use of the latter, and therefore more effective federal action is required.

Since these tests and devices are being used as a tool of discrimination in some states in preventing citizens from exercising their right to vote on the basis of race and color, legislation, prohibiting their employment in those circumstances where the voting records of a given state prove that they have been used to perpetrate that which the Fifteenth Amendment was designed to uproot is an appropriate exercise of the Congressional power.

This proscription or automatic suspension of voter qualification laws where necessary to meet the risk of continued or renewed violations of constitutional rights will give

way to a judicial declaration that the tests or devices are not so employed, but it is a means to solve a problem within the legitimate concern of the Congress and the choice of means is largely a legislative question. Given a "rational basis" for the congressional action the Court's investigation is at an end. *Katzenbach* v. *McClung,* 379 U. S. 294, 303-304.

It remains only to determine whether or not the Act, although appropriate, is prohibited in light of Article I, Section 2 and the Seventeenth Amendment which commit the matter of qualification of voters to the states. The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. However, these state conditions or standards may not be discriminatory nor may they contravene any constitutional restriction. Hence, when state power is abused, as here shown, subject to judicial declaration otherwise, that power is subject to Federal action by Congress as well as by the courts under the Fifteenth Amendment.

CONCLUSION

For the reasons stated it is respectfully submitted that the Court sustain the constitutionality of the Voting Rights Act of 1965.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1965

NO. 22, ORIGINAL

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH
Attorney General of the
United States, *Defendant*

BRIEF OF THE PLAINTIFF

JURISDICTION

The Plaintiff is a Sovereign State of the United States. The Defendant is a resident of a State other than the Plaintiff and is currently serving as the Attorney General of the United States. The jurisdiction of this Court is invoked under Article III, §2, Clauses 1 and 2 of the Constitution of the United States.

QUESTIONS PRESENTED

1. Because of their patent abrogation of other constitutional limitations and guarantees and their failure to accomplish reasonably its purposes, do §§4, 5, 6(b), 11 and 12 of the Act fail to meet the standard of appropriateness required by the Fifteenth Amendment?

2. By applying, only because of the past lawful conduct of their citizens, to predetermined Sovereign States to deprive their citizens and governments of their lawful electorate and to paralyze the legislative and administrative control of future elections by their governments, do §§4, 5, and 6(b) of the Act constitute a Congressional "legislative trial" of nine Sovereign States and their citizens in violation of Article I, §9, Clause 3, and Article III of the Constitution of the United States?

STATEMENT

On August 6, 1965 the President approved the Voting Rights Act of 1965, Public Law 89-110.[1] The next day appropriate "notices" were published in *The Federal Register* by the Department of Commerce, Bureau of Census and the Department of Justice in order to make certain provisions of the Act applicable to South Carolina and certain other Sovereign States.[2] On the same day the Defendant directed the Chairman of each County Board of Registration in South Carolina to suspend the enforcement of her lawful literacy test.[3] As directed, enforcement of these tests was discontinued.[4] On September 29, 1965 South Carolina filed with this Court a motion requesting permission to file her Complaint challenging the enforcement of certain provisions of the Act by Nicholas deB. Katzenbach, Attorney General. By his Memorandum of October 1965, the Defendant declined to oppose this Motion and permission to file was granted by Order of this Court on November 5, 1965.

Meanwhile, on November 8, 1965, the Defendant dispatched, under the Act, federal examiners to Dorchester and Clarendon Counties in South Carolina, not because of

[1] Hereinafter referred to as "the Act".

[2] Complaint, Exh. F-3, p. 35. The covered territories were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of Arizona and North Carolina. Coverage was not initially invoked as to counties in Idaho and Maine.

[3] Complaint, Exhs. F-1 and 2, p. 32-34.

[4] As we go to press, the Civil Rights Commission reports that approximately 9,500 South Carolina residents have since been registered. *The State* (Columbia, S. C.) p. 1-B, Dec. 6, 1965.

any enforcement of South Carolina's literacy requirement, but presumably because officials in those counties refused to open their registration books on days not required by South Carolina law.[5] On November 19, Defendant filed his Answer to the Complaint. This brief is filed in anticipation of the hearing on the pleadings set for January 17, 1966.

INTRODUCTION

At the outset, it is essential that the extent of this challenge be made clear. The Act as a whole is very broad, containing many prohibitions against the deprivation of the right to vote because of racial discrimination. Specific provisions authorize resort to the Federal Courts to enforce the protections guaranteed.[6] Upon a finding that the outlawed discrimination exists, the federal judiciary is given broad remedial powers to correct these conditions, including the right to authorize federal examiners to enforce the State law fairly.[7]

For the most part this action does not challenge the validity of these sections which prohibit the unlawful conduct and authorize judicial remedies to prevent its occurrence. Rather this proceeding questions the constitutionality of those sections of the Act falling into two general categories: (1) those which prejudge, without any judicial hearing, the conduct of selected States and automatically suspend their valid laws and legislative capacities,[8] and (2) those which make criminal, conduct unrelated to race or any form of "State action".[9] It is this method in which Congress has chosen to legislate, not its goals, that are challenged.

Undoubtedly much will be said about the deference due Congressional legislation and the presumption of constitutional validity which attaches to any legislative action.

[5] See Appendix A, Reply Memorandum for Plaintiff, p. 5, November 1965; *The National Observer*, November 22, 1965, p. 2.

[6] §3, Complaint Brief, Appendix B, p. 80-82.

[7] §6(a), Complaint Brief, Appendix B, p. 85.

[8] §§4, 5, and 6(b) of the Act, Complaint Brief, Appendix B, p. 82-86.

[9] §§11 and 12, Complaint Brief, Appendix B, p. 91-93.

These principles cannot be questioned and should be studiously enforced wherever applicable. The conduct of one federal Branch is always entitled to such respect from another. But as will hereafter be shown, when that conduct exceeds constitutional bounds, it is the duty of the other branch of the government, in fact its reason for existence, to bring it into compliance with the Constitution.[10]

SUMMARY OF ARGUMENT

I

The Voting Rights Act of 1965, in its pertinent parts, is not "appropriate" legislation to enforce the Fifteenth Amendment in that, without regard to racial discrimination, it deprives South Carolina and certain other states of the rights to prescribe voter qualifications as reserved and guaranteed by Article I, Sections 2 and 4 of and by the Seventeenth Amendment to the Constitution of the United States.

The percent of persons voting in South Carolina in the Presidential election of November, 1964, has no relation to the denial or abridgment of the right of a citizen to vote on account of race. The failure of 50 percent of South Carolinians over the voting age to vote in the 1964 election is due to economic and political factors without the scope of the Fifteenth Amendment. The Act, in suspending voter literacy tests in South Carolina, while leaving similar tests in effect in other states, violates the Constitutional prin-

[10] *Bordens Farm Products v. Baldwin*, 293 US 194.

The Court is respectfully requested to consider the Plaintiff's brief filed with her Complaint and the Appendices thereto, in conjunction with that which follows.

No further comment on jurisdiction or the right to maintain this action will be made except:

(1) On the question of "standing", the Court's attention is directed, in addition to the authorities cited at Complaint Brief p. 44 to 48, to *Hopkins Federal Savings & Loan Association v. Cleary*, 296 US 315.

(2) To meet any suggestion that this cause is against the Federal Sovereign, without its permission, to the expressions of footnote 9 at page 48 of the Complaint Brief would be added the thought that the Congressional waiver of §4(a) of the Act extends to the Original Jurisdiction of this Court, which is, by the Constitution, coextensive in all relevant aspects with that of the United States District Court for the District of Columbia.

ciple of Equality of Statehood, as implied in Article IV, Sections 2 and 4 and in the Fifth Amendment.

In creating a conclusive presumption that the failure of 50 percentum of South Carolina's residents of voting age to vote was caused by racial discrimination in voter registration, the Act is arbitrary in violation of the due process clause of the Fifth Amendment.

Section 5 of the Act prohibits South Carolina and her inhabitants from amending their election laws, standards, practices and procedures without the approval of the Attorney General of the United States or of the United States District Court for the District of Columbia. Sections 6 and 7 of the Act provide for the appointment by the Civil Service Commission, at the instance of the defendant, of examiners with authority to register persons ineligible to vote under her literacy test, under circumstances they prescribe, and to require state election officials to keep these names on the registration books and to allow them to vote in all elections. These sections usurp the powers of South Carolina's legislative and executive departments in violation of Article 4, Sections 2 and 4 and the provisions of the Fifth Amendment.

II

The Act adjudges South Carolina and her citizens guilty of racial discrimination in voter registration solely on the basis of a past fact — the failure of 50 per centum of her residents of voting age to vote in November, 1964. By so doing, the Congress has usurped the federal judicial power in violation of the separation of powers among the three Branches of Government inherent in the Constitution as expressed in Article III. By diluting the vote of electors qualified under South Carolina law, by allowing the unqualified to vote and paralyzing their Legislature, the Act takes from the inhabitants of South Carolina their government and thus their liberty, without a judicial trial, in violation of Article I, Section 9 of the Constitution.

ARGUMENT

I.

THE ACT IS NOT "APPROPRIATE" TO ENFORCE THE FIFTEENTH AMENDMENT

A. THE CHALLENGED PROVISIONS OF THE ACT DEPRIVE SOUTH CAROLINA AND HER CITIZENS OF BASIC RIGHTS SECURED AND PROTECTED UNDER OTHER PROVISIONS OF THE CONSTITUTION

The Act is grounded upon the Fifteenth Amendment, §2 of which authorizes Congress to enforce its provisions by "appropriate" legislation.[11] To judge its "appropriateness", it is necessary to begin with consideration of the basic structure of the Constitution. It creates a government of limited powers.[12] In any matter of constitutional interpretation, the decision must be made in the light of the whole compact. Each limitation and guarantee must be construed in harmony with others.

> It is settled beyond dispute that the Constitution is not self-destructive. In other words that the powers which it confers on the one hand it does not immediately take away on the other;[13] . . .

This must be true, for no one provision is superior to the others.

> As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion.[14]

Equally do these principles apply to the constitutional amendments.

Except to the extent that an amendment specifically changes an existing guarantee or limitation, the preexisting provision speaks with the same voice.

> Nothing new can be put into the Constitution except through the amendatory process; nothing old can be taken out without the same process.[15]

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[11] Complaint Brief, Appendix B, p. 79.

[12] *Marbury v. Madison*, 1 Cranch 175.

[13] *Billings v. United States*, 232 US 261, 282. Cf. *Rhode Island v. Massachusetts*, 12 Pet. 657.

[14] *Ullmann v. United States*, 350 US 422, 428.

[15] *Ibid.*

This status of the amendments was only recently so characterized:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interest at stake in any concrete case.[16]

Therefore it is proper to judge the "appropriateness" of this legislation not only in light of the Fifteenth Amendment which it purportedly enforces, but also against the background of the entire Compact.[17] If it exceeds the sole purpose of the Fifteenth Amendment to prevent racial discrimination in voting by unnecessarily abrogating basic limitations and guarantees contained elsewhere in the Compact, it cannot be deemed "appropriate".[18] This, the challenged provisions of the Act clearly do.

> 1. Sections 4, 5 and 6(b) grant the right to vote to certain of South Carolina's unqualified residents in violation of her laws and deprive her and her citizens of their right to prescribe lawful voter qualifications and regulations for her elections in violation of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution of the United States.

There can be no serious doubt that the original architects of the Constitution, in granting limited powers to the Federal Government through its provisions, intended to reserve to the Sovereign States exclusive control over all matters pertaining to suffrage and elections, except in certain particulars dealing with national representatives. The Constitutional language is specific:

---

[16] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 US 324, 332.

[17] "Nor, where fundamental rights are declared by the constitution, is it necessary at the same time to prohibit the legislature, in express terms from taking them away. The declaration is itself a prohibition, and is inserted in the constitution for the express purpose of operating as a restriction upon legislative power." *1 Cooley's Constitutional Limitations*, 358 (8th ed. 1927). See *Minor v. Happersett*, 21 Wall 162, 175.

[18] See the careful language of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat 1, 196 and *McCullough v. Maryland*, 4 Wheat 316, 421.

> . . . the Electors in each State shall have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature. Article I, §2
>
> The Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may . . . alter such regulations. Article I, §4[19]

This was the intent of the authors. Referring to the definition of the right to suffrage Hamilton or Madison said:

> It was encumbent on the convention, therefore, to define and establish this right in the Constitution. . . . The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state, because it is conformable to the standard already established, or which may be established, by the state itself. It will be safe to the United States, because, being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the states will alter this part of their Constitutions in such a manner as to abridge the rights secured to them by the federal Constitution.[20]

Even more important, to date, this has been the understanding of this Court. In practically every case to reach it involving voting rights, no matter what the outcome, the decision carefully reiterated the exclusive prerogative of the States to provide the qualifications of its electors and regulate its elections, except as specifically limited by the Constitution. For example, *Minor v. Happersett*, 21 Wall 162; *United States v. Cruikshank*, 92 US 542; United *States v. Reese*, 92 US 214; *Ex Parte Seibold*, 100 US 371, *In Re Rahrer*, 140 US 545; *McPherson v. Blacker*, 146 US 1; *Williams v. Mississippi*, 170 US 213; *Mason v. Missouri*, 179 US 328; *James v. Bowman*, 190 US 127; *Pope v. Williams*, 193 US 621; *Guinn v. United States*, 238 US 347;

[19] Cf. Article II, §1, Clause 2 of the Constitution of the United States.

[20] "The Federalist, No. LII" (Hamilton or Madison), Lodge, *The Federalist*, 328 (1888).

Breedlove v. Suttles, 302 US 226; *Snowden v. Hughes*, 321 US 1, *Lassiter v. Northhampton Board of Elections*, 360 US 45; *Gray v. Sanders*, 372 US 368; *Carrington v. Rash*, 380 US 89.

The Fifteenth Amendment of 1870 made no change in this basic Constitutional design. Its language, in relevant aspects, refers only to *abridgment* or *denial* by *States* of the right to vote *on account of race.*[21] The available legislative history before and after its passage indicates no change in the reservation.[22] Such must have been the understanding of Congress forty-three years after the passage of that Amendment when it passed an amendment changing the manner of choosing Senators.[23] The original language of the constitutional structure was reaffirmed:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.[24]

Again, the understanding of this Court with respect to the effect of the Fifteenth Amendment has been no different.

> Beyond doubt the Amendment does not take away from the State government in a general sense the power of suffrage which has belonged to those governments from the beginning, and without possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rests would be without support and both the authority of the Nation and State would fall to the ground. In fact the very command of the Amendment recognizes the possession of the general power by the State, since the

[21] Complaint Brief, Appendix B, p. 79.

[22] Appendix, Brief of the Commonwealth of Virginia as *Amicus Curiae*, in this cause.

[23] It is noteworthy that this change was made by constitutional amendment, and not by Congress, even though federal representatives were involved. Compare *Morgan v. Katzenbach*, ... F Supp ..... (D.C. 1965) 34 LW 2265.

[24] Seventeenth Amendment, Complaint Brief, Appendix B, p. 79.

Amendment seeks to regulate its exercise as to the particular subject with which it deals.[25]

In short, the sole effect of the Fifteenth Amendment on the exclusive rights of the Sovereign States to regulate suffrage was that they could make no distinction in granting or withholding the privilege on the basis of race. Presumably, Congressional legislation to enforce this mandate could not go beyond this limit.

But Congress now purports to do so. Sections 4 and 5 of the Act, (1) *grant* certain of South Carolina's previously unqualified citizens *the right* to participate *as electors* in her governments in violation of her laws and, (2) deprive her legislature, officials and residents of their right to regulate freely their future elections. These sections cannot be "appropriate" within the meaning of the Fifteenth Amendment.

South Carolina's literacy test was lawful prior to August 6, 1965. It required only the ability to read and write and was simpler than that only recently unanimously upheld by this Court, with seven of the present members sitting. *Lassiter v. Northhampton Board of Elections*, 360 US 45.[26] In its decision, this Court unequivocably held that a literacy requirement was not offensive to the Fifteenth Amendment —that it deprived no one of the right to vote because of *race*. This decision was consistent with available legislative history of the Fifteenth Amendment on this subject.[27]

Yet, by §4 of the Act, Congress has attempted to suspend South Carolina's literacy requirement *regardless of race*. Under the Act, at the Defendant's direction, both white and Negro illiterates are now being registered to vote. Race, under the Act's suspension, is not a factor. The Act abso-

[25] *Guinn v. United States*, 328 US 347, 362. Cf. *McPherson v. Blacker*, 146 US 1, 38; *Breedlove v. Suttles*, 302 US 277; *Pope v. Williams*, 193 US 621; *Gray v. Sanders*, 372 US 368; and, quoted at Complaint Brief, p. 60, *United States v. Reese*, 92 US 214 and *Minor v. Happersett*, 21 Wall 162.

[26] South Carolina's Constitution contains no English language requirement, as presented there. Its administration could not be less complicated. Complaint, Par. 11, p. 6, Exh. B, p. 20.

[27] Appendix, Brief of the Commonwealth of Virginia as *Amicus Curiae*, in this cause.

lutely grants the right to *all* illiterates in South Carolina to participate in her elections.

Perhaps, consistently, neither is "race" relevant to those States not covered by §4. In the unaffected States,[28] their existing literacy tests are still a prerequisite to voting eligibility, regardless of whether they effectively deny any race the right to vote. Likewise all "uncovered" States are free to enact such tests if none exist. Equally consistent, the present or future stringency of such requirements are not affected by the Act.

If, regardless of race, Congress may, under the Fifteenth Amendment, deprive South Carolina of the right to prescribe a lawful literacy requirement for her elector qualifications in spite of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution, may it not also deny *any* qualifications for the participation of her citizens in its elections? In effect, the Act attempts to do so.

By §5 of the Act, South Carolina may not now change any "qualification, prerequisite standard practice or procedure" with respect to voting in effect on November 1, 1964 without the prior approval of the Executive or Judicial arm of the Federal Government.[29] Again, "race" is not a factor under the Act. Regardless of whether the change affects Negro or white, governs federal or state elections, is designed to improve or modernize election procedures, or lessen or remove registration qualifications, it is prohibited without prior approval.[30] Under the Act, the Federal, not the State, government, now controls the future of election procedures in South Carolina.

Nor is this all. Since she is covered by §4, South Carolina is subject to federal "examiners" at the whim of the

[28] California, Connecticut, Delaware, Hawaii, Massachusetts, New Hampshire, New York, Oregon, Washington, Wyoming and, perhaps, Maine (See Answer, Par. 17, p. 4). These states now have some form of literacy requirement.

[29] Either the Attorney General or the United States District Court for the District of Columbia. Sect. 5 of the Act, Complaint Brief, Appendix B, p. 84-85.

[30] In 1965, South Carolina's Legislature extended the closing hours of her polling places from 6:00 P.M. to 7:00 P.M. See Complaint Brief, Appendix A, p. 75. This practice was not in effect on November 1, 1964. Is it valid under §5? If not, are all votes cast after 6:00 P.M. in future elections subject to challenge under the Act?

Defendant under §6(b).[31] These examiners, under other provisions, at times and places suitable to them, receive applicants, issue voting certificates, supervise elections, review voter tabulations, and determine to their satisfaction the valid State voter qualifications to be enforced.[32] Monthly, these examiners submit the thousands of names enrolled during the previous month to the *county* registration office, and challenges are permitted at the *State* Civil Service Office within ten days thereafter, *if* accompanied by affidavits of two persons having personal knowledge of the basis of the challenge *and* a certification of service of the prescribed notice of the challenge in person or by mail to the person challenged.[33] Except as to successful challenges, the county official is required to place all names submitted on the registration rolls and to permit their vote.[34] How does a limited county registration staff check the residence, age, sanity and felony conviction record of thousands of persons, in the presence of two witnesses, within ten days? In practical effect, under the Act, federal officials determine which persons, not already registered on August 6, 1965, shall become eligible voters in South Carolina and certain of her sister States.

The presence of the federal examiners produces further interesting side effects. Presumably they will only be in South Carolina temporarily until existing illiterates have been registered.[35] Yet under the Act, the illiterate remains an eligible voter until his name is removed *by the examiner*.[36] Under her Constitution and statutes, South Carolina requires her electorate to re-register or re-enroll every ten years.[37] Are these provisions now invalid with respect to illiterates registered by the federal examiner, if he is no

[31] Complaint Brief, Appendix B, p. 86. They are now present. See footnote 5, p. 3.

[32] Sects. 7, 8 and 9 of the Act, Complaint Brief, Appendix B, p. 86-89.

[33] Sects. 7(b) and 9(a) of the Act. Complaint Brief, Appendix B, p. 86-89. There is no requirement that the enrollment list contain addresses of the illiterate electors.

[34] Sect. 7(b) of the Act, Complaint Brief, Appendix B, p. 86.

[35] Sect. 13 of the Act, Complaint Brief, Appendix B, p. 93.

[36] Sect. 7(d) of the Act, Complaint Brief, Appendix B, p. 87.

[37] Article II, §4(d), Constitution of South Carolina, §23-67 of the 1962 Code of Laws of South Carolina.

longer present? If so, the Act not only grants the illiterate the right to vote, but also places him in a privileged category over the other electorate. Similar problems exist with respect to the death, removal or felony conviction of the illiterate after the examiners' departure. Under these provisions, the deprivation of South Carolina's control over her electorate and elections would appear to be complete and, perhaps, permanent.

In summary, if §§4, 5 and 6(b) of the Act be valid, the doctrines of the specific constitutional reservations of Article I, §§2 and 4 and the Seventeenth Amendment on the Federal Government of limited powers, the intentions of the compact architects, the cited decisions of this Court, and the particular language of this Court that:

> A State, so far as the Federal Constitution is concerned, might provide by its own Constitution and laws that none but native-born citizens be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; . . .[38]

no longer obtain in South Carolina and in all or part of the territories of eight of her sister States.

In abrogating these traditional principles, these sections of the Act cannot be said to be "appropriate".

> 2. The Act violates the fundamental constitutional principles of Equality of Statehood.

The Constitution was formed by equal Sovereign States, from whom the Union drew its enumerated powers. From its inception these States stood on "equal footing" before the National Sovereign.

> There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion, which they may possess and

[38] *Pope v. Williams*, 193 US 621, 633.

> exercise over persons and subjects within their respective limits.[39]

This was the status of newly admitted states upon joining the Union.

> Equality of constitutional right and power is the condition of all the States of the Union, old and new.[40]

Of course this equality was never understood to extend to economic stature or standing among the States, since each entered with a different geology, population, location, area and latitude.[41] However, until now, there has always been equality in political rights and sovereignty.[42] Until now, any legislation of the federal Congress affecting those political rights and sovereignty has applied equally, on a nationwide basis, to all sovereign members of the Union.

The Act would change this fundamental doctrine. Sects. 4, 5 and 6(b) are carefully limited in their application to seven Sovereign States and portions of two others. Based upon past election results and tabulations, these provisions were tailored to limit their application to those particular States as if descriptions of geographical boundaries had been used.[43]

Only in these nine states are lawful voter qualifications suspended. Only in these states are the legislatures stricken dumb on election laws, the duties of local registrars usurped by federal examiners, and the supervision of elections delegated, in practical effect, to federal employees—all without any form of judicial hearing.

If Congress may so abrogate this fundamental principle, when purporting to enforce the Fifteenth Amendment, why may not it do so under its other enumerated powers? Under the guise of the Fourteenth Amendment, why could Congress not deprive nine states of the right to punish

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[39] *Illinois Central Rrd. Co. v. Illinois*, 146 US 387, 434; *Coyle v. Smith*, 221 US 559, 580.

[40] *Escanaba & L. N. Transportation Co. v. Chicago*, 107 US 678, 689.

[41] *U. S. v. Texas*, 339 US 707.

[42] *Illinois Central Rrd. Co. v. Illinois*, supra; *Stearns v. Minnesota*, 179 US 223.

[43] The only possible exception might be Alaska and Elmore County, Idaho.

murder, or theft, or fraud, or arson, or the right to protect one or more forms of property? If these sections of the Act are "appropriate", where does the precedent stop?

An argument similar to this legislation was presented to this Court about two years ago.[44] The Solicitor General contended that the prior conduct of the governments of certain southern States constituted their use of the police power "state action" under the Fourteenth Amendment, in contradistinction to the standard applicable elsewhere. Said Mr. Justice Black:

> There is another objection to accepting this argument. If it were accepted, we would have one Fourteenth Amendment for the South and quite a different and more lenient one for other parts of the country. Present "state action" in this area of constitutional rights would be governed by past history in the South—by present conduct of the north and west. Our Constitution was not written to be read that way and we will not do it.[45]

This clear violation of the principles of the Equality of Statehood cannot be deemed "appropriate" legislation.

3. In violation of the Fifth Amendment, §4 of the Act creates an arbitrary and irrebuttable presumption of racial discrimination by South Carolina and her inhabitants in connection with her voter registration.

Ordinarily, the legislative function is prospective in nature—that of prescribing rules for future conduct.[46] Occasionally, however, usually because of some "emergency" or popular pressure, or in order to solve some particularly perplexing problem, the Legislature undertakes to determine by statute in advance the effect of certain given conduct by the use of "presumptions".

As a protection against abusive use of such "presumptions" by an overzealous Congress, a specific restriction

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[44] Supplemental Brief of the United States as *Amicus Curiae*, *Griffin v. Maryland, et al*, Nos. 6, 9, 10, 12 and 60, October Term, 1963.

[45] *Bell v. Maryland*, 378 US 226, 334 (Dissenting Opinion).

[46] *Prentis v. Atlantic Coast Line Co.*, 211 US 210.

was added to the compact,[47] with the burden of its enforcement resting upon the Judiciary.[48] This "due process" limitation on the Congress requires that the presumption be reasonable and not "arbitrary" and that it be subject to being rebutted by proof to the contrary, or be not absolutely conclusive. The presumption of §4 abrogates both of these limitations of the Fifth Amendment.

(a) The presumption is arbitrary.

Only last month this Court reaffirmed the standard against which such legislation must be tested:

> Such a legislative determination would not be sustained if there "was no rational connection between the fact proved and the fact presumed, if the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience . . ."[49]

There, "possession, custody and control" of an illegal whiskey still could not be inferred from "presence" at the site, as Congress had directed. Similarly, in *Tot v. U. S.*, 319 US 463, the Congressional presumption that a firearm in the possession of a convicted felon, must have been shipped in interstate commerce was arbitrary and unconstitutional.[50]

Sometimes this legislative restriction is described in terms to the effect that the conduct on which the presumption is based must give fair warning of the result presumed.

> What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. . . . For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance. . . .[51]

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[47] The Fifth Amendment. As *parens patriae* the Plaintiff here asserts the rights of her citizens to its protections against the National Legislature.

[48] *Marbury v. Madison*, 1 Cranch 175.

[49] *U.S. v. Romano*, ... US ....., 34 L.W. 4022, 4023 (Nov. 22, 1965).

[50] Cf. *Bailey v. Alabama*, 219 US 219, *Mobile J.K.C.R.P. Co. v. Turnipseed*, 219 US 35.

[51] *Morrison v. California*, 291 US 82, 90.

At other times, this Court has talked in terms of whether the Legislature could fairly shift the burden of proof to the accused, relieving the government of its obligation to prove its case.

> The question for decision therefore was whether the allocation of the burden of proof on an issue concerning freedom of speech falls short of the requirements of due process.[52]

Under any of these approaches, Congress has created an arbitrary presumption in §4 of the Act.[53] It is presumed that South Carolina was guilty of racial discrimination in the administration of her voter registration laws on November 1, 1964 because (1) she had a literacy requirement and (2) less than 50% of her population over age 21 voted in the Presidential election of November 1964. An analysis of each of these essential facts, in light of the result presumed, is necessary.

(1) The percentage voting test

The presumption of §4 assumes racial discrimination in *registration.* The principal fact upon which it rests is *voting*, not registration. Congress has said that because 32% of South Carolina's *registered* voters did not *vote*, she is guilty of not registering her Negro citizens. There is absolutely no rational connection between the two conclusions. For example, if 100% of her literate population over 21 were registered, but only 49% chose to vote, South Carolina would be presumed guilty of racial discrimination in her registration procedures. On the other hand if she were, in fact, guilty of discrimination in registration and if 90% of her registered voters had voted,[54] the presumption would not apply.

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[52] *Speiser v. Randall*, 357 US 513, 523. See *Manley v. Georgia*, 279 US 1, 5; *McFarland v. American Sugar Refining Co.*, 241 US 79.

Reflecting the same principle, are those cases dealing with improper legislative classification. The facts upon which the separate treatment is supported must reasonably justify the classification. *Carrington v. Rash*, 380 US 89; *McLaughlin v. Florida*, 379 US 184; *United States v. Carolene Products Co.*, 304 US 144; *Bordens Farm Products Co. v. Baldwin*, 293 US 194; and *Chastleton Corp. v. Sinclair*, 264 US 543.

[53] Sometimes hereinafter referred to as the "trigger".

[54] Such a percentage turnout was not unheard of in the 1964 election. See Complaint, Exh. C-2, p. 23.

The absurdity of the relationship between the fact and the conclusion is further revealed in the evidence presented to Congress. There was evidence submitted of known voter discrimination in parts of Florida, Arkansas, Texas, Tennessee, Kentucky and New York.[55] However, these states are not reached by the "trigger", even though, like South Carolina, Arkansas and Texas also voted less than 50% of their population over twenty-one.[56] This, even though the Defendant testified that South Carolina, unlike these states, was free of voter discrimination.

> That this premise is generally valid is demonstrated by the fact that in six of the seven states in which tests and devices would be banned statewide by §3(a), voting discrimination has been unquestionably widespread in all but South Carolina and Virginia, and other forms of racial discrimination, suggestive of voter discrimination, are general in both of these states.[57]

The arbitrariness of the percentage voting test in relation to racial discrimination and registration is further illustrated by its failure to allow any consideration of the variation in factors which affect the test itself. The Act's history clearly shows that the 50% voter test was designed to measure South Carolina's turnout against that of the national average of 62%[58] yet there are factors peculiar to South Carolina and some of the other "covered" States

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[55] Hearings, H.R. 6400, Ser. 2, p. 68-69, 75-76, 89, 273-284, 362-364, 368-369, 373, 405, 418-421, 461-462, 508-518, 527-529, 674, 714; S. 1564, Pt. 1, p. 246, 238, 339. (All references here to "Hearings" refer to the published hearings before the subcommittee of the House or Senate Judiciary Committees on the Act depending upon the reference to the House (H.R. 6400) or the Senate (S. 1564) Bills); United States Code Congressional and Administrative News, 89th Cong. 1st Sess. p. 2540, 2645-47 (hereinafter referred to as "US Code News").

[56] Interestingly enough the District of Columbia, like South Carolina, only voted 38%. Hearings, S. 1564, Pt. 1, p. 238. See the explanation the Defendant offered. Hearings, S. 1564, Pt. 1, p. 29-30.

[57] Hearings, H.R. 6400, Ser. 2, p. 12, Attorney General Katzenbach. Cf. Hearings, H.R. 6400, Ser. 2, p. 112-120; S. 1564, Pt. 2, p. 1513-1514; US News Code, p. 2544. To date the Defendant *still* knows of *no* voter discrimination in South Carolina. See his Answer, pars. 14 and 15, p. 4.

[58] See, for example, Hearings, H.R. 6400, Ser. 2, p. 26-27.

which affected her voter participation and which are unrelated to racial discrimination.[59]

For several generations the income and educational levels of South Carolina's inhabitants have been substantially below those of other States against whom her voter turnout was measured.[60] She has traditionally maintained an agrarian economy with no major metropolitan centers, as distinguished from the urban industrial nature of much of the rest of the country. The religion of her population is more predominantly Protestant than that of most areas. As shown by Appendix C, page 46, all of these economic and population characteristics tend to reduce her voter participation and are peculiar only to South Carolina and some of the other "covered" States.[61] Yet, the "trigger" allows no room for their consideration.

Equally relevant in considering the reasonableness of the voter turnout test is the unique political history of South Carolina and some of the other "covered" States. For over forty years these States, under their one-party Democratic Party system, have chosen their elected officials in the primary elections, and not at the general election, which is the measure under the "trigger".[62] The uniqueness of this system to the South is worthy of the Court's judicial notice.[63] It cannot be denied that such a custom of the populace in choosing their local and state officials in a primary affects their interest in the general election, where races for such offices are nonexistent or uncontested.[64]

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[59] Neither does the 50% test reflect any connection with the percentages of white and Negro population in the covered areas. Hearings, H.R. 6400, Ser. 2, p. 48, 91, 289; US Code News, p. 2540.

[60] Complaint Exhs. D-1, 2, p. 24-25.

[61] Hearings, H.R. 6400, Ser. 2, p. 500; S. 1564, Pt. 1, p. 734-741. See the analysis of McConaughy & Gauntlett, *A Survey of Urban Negro Voting Behavior in South Carolina*, 14 S.C.L.Q. 365, 379 (1962).

[62] See Complaint Exh. C-1, p. 21.

[63] Cf. *U.S. v. Classic*, 313 US 299; *Ray v. Blair*, 334 US 214; *Smith v. Allwright*, 321 US 649; *Grovey v. Townsend*, 295 US 145; *Elmore v. Rice*, 72 F Supp 216 (EDSC 1947).

[64] Compare Columns 7-11 with Columns 17 and 18, Complaint Exh. C-1, p. 21. Note the increase in the contested races for local offices in the general election due to the Republican Party activity in 1964. Complaint Exh. A, p. 18-19, Cols. 9-12 compared with Complaint Exh. C-1, p. 21, 1962, Cols. 7-11. This rise reflects a dissatisfaction with the traditional party which kept many voters home on November 3, 1964, proof of which cannot be submitted here. Hearings, H.R. 6400, Ser. 2, p. 500; S. 1564, Pt. 1, p. 240, 267.

That all of these political, economic and population characteristics peculiar to the covered States affected their turnout is verified by comparison of the interest shown by their *registered* voters and those in other States.[65] Almost without exception, a fewer percentage of the registered voters in the covered States turned out on November 3, 1964. Because of this Congress presumes them guilty of discriminatory registration without regard to the facts peculiar to their citizenry and not found to a comparable degree in other States against whom their performance is measured.

Nor can it be suggested that the voter turnout test adopted by Congress was designed in any sense to give South Carolina fair warning of the result to be presumed. Who could have suggested in October 1964 that South Carolina would lose her lawful literacy test and right to control her elections unless a sufficient number of her citizens went to the polls in November?

Neither is this a fair test by which to measure the punishment of the populace of an entire State. Even if warned, how could South Carolina have forced her citizens to vote?

> The act of voting is an exercise of sovereignty and cannot be compelled.[66]

The right is personal and private to the citizen, not the state government.[67]

Finally, the territories caught up by the "trigger" afford perhaps the best example of its arbitrariness. No one would suggest there is massive racial voter discrimination against Negroes in Arizona, Alaska, or Elmore County Idaho (or Aroostook County Maine).[68]

In short, the presumption of registration discrimination because of a low voter turnout finds no basis in human experience and is patently arbitrary.

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[65] Complaint, Exh. C-2, p. 23. Strangely, it does not appear that these percentages were presented to Congress.

[66] *2 Cooley's Constitutional Limitations*, p. 1354 (8th ed. 1927).

[67] *Reynolds v. Sims*, 377 US 533; *U.S. v. Bathgate*, 246 US 220, 227.

[68] While maybe of small import, the "trigger" actually discriminates among the territories it covers. In South Carolina, all political subdivisions are covered even though over 50% of their voting age population voted. See Complaint, Exh. A, p. 18-19, Lines 2, 6, 8, 18, 22, 28, 32, 36. In all other States, except Alabama, Alaska, Louisiana, Mississippi, Georgia and Virginia, only the counties voting less than the requisite 50% are reached.

2. The literacy test

Congress has also presumed registration discrimination on the part of South Carolina because, on November 1, 1964, she had in effect a lawful literacy requirement for voter qualification.[69] This presumption finds no support in the evidence before it.

Again, there was no evidence of "massive" registration discrimination presented as to South Carolina.[70] Yet she is presumed guilty because of the existence of her literacy qualification. Ample evidence of racial discrimination in registration in New York was submitted to the Congress.[71] It too has a literacy test, more stringent than South Carolina's.[72] Yet there is no presumption of guilt on her part because of the existence of her literacy test.

Evidence of voter discrimination in Arkansas, Texas, Kentucky and Florida was also presented.[73] None of these States have a literacy requirement, so they are not presumed guilty of registration discrimination. Yet South Carolina, *with* her literacy requirement, *registered* her citizens on a comparable or higher basis.[74] Plainly, there is no rational basis for assuming that South Carolina is guilty of racial discrimination in registration simply because of the existence of her lawful literacy requirement.

Finally, in considering the reasonableness of the facts to which Congress "triggered" the application of the Act to South Carolina, the very selection of these particular factors is worthy of comment. With next to the highest illiteracy rate in the Union,[75] South Carolina's literacy requirement would ordinarily disqualify more of her citizens from voting than a similar test in other States, regardless of

[69] As elsewhere indicated this requirement was perfectly constitutional, supra, p. 10.

[70] Unquestionably, "massive" discrimination was the target. Hearings, H.R. 6400, Ser. 2, p. 27, 76-77, 287. As to the absence of such in South Carolina, see footnote 57, supra, p. 18.

[71] See footnote 55, supra, p. 18.

[72] Hearings, S. 1564, Pt. 1, p. 766-768.

[73] See footnote 55, supra, p. 18.

[74] South Carolina, 56% registered; Arkansas, 56% registered; Florida, 54% registered; Kentucky, 51% registered; and Texas, 56.3% registered.

[75] Complaint, Exh. B-2, p. 25.

their race. Therefore her electorate would necessarily comprise a smaller percentage of her *total* population over twenty-one than that of other States. Her voter turnout therefore would ordinarily always be a smaller percentage of her *total* population over twenty-one. Yet it is the combination of these two factors—the existence of a literacy requirement and a low percentage turnout of *total* population over twenty-one—on which Congress bases its presumption of racial discrimination. Neither, standing alone, or in combination, in fact reflect unlawful racial *discrimination.*

(b) The presumption is absolutely conclusive

Not only must Congressionally established presumptions be reasonably connected to the facts on which they rest, they must be subject to being disproven in the given case. Due process prohibits the absolute declaration of the conclusion presumed.

> A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repeal it violates the due process clause of the Fourteenth Amendment. . . . Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.[76]

Congress has concluded that South Carolina was guilty of racial discrimination in the administration of her election laws on November 1, 1964. However, she is permitted no opportunity to present evidence or to have a judicial hearing on the fact presumed—her guilt at that time. Her conviction is absolute.

Recognizing the inherent unconstitutionality of such an irrebuttable presumption, Congress sought to avoid its condemnation by authorizing an "escape clause".[77] Under this provision, South Carolina can avoid the Act by proving her

[76] *Manley v. Georgia*, 279 US 1, 6. Cf. *Aptheker v. Secretary of State*, 378 US 500; *Wieman v. Updegraff*, 344 US 183; *Heiner v. Donnan*, 285 US 312; *Western and Atlantic Railroad v. Henderson*, 279 US 639; *Mobile J.K.C.R.P. Co. v. Turnipseed*, 219 US 35; *Lindsley v. National Carbonic Gas Co.*, 220 US 61.

[77] Sect. 4(a), Complaint Brief, Appendix B, p. 82-84.

innocence to a United States District Court in Washington, D. C.[78] But the requirement is not that of proof of conduct on November 1, 1964, but that *for every day* of *the five years* preceding her resort to the procedure.

Could Congress direct that, to be proven innocent, the accused must not only convince the court that he did not steal the articles charged, but that he has never stolen in the past five years? This, in effect, is what §4 offers South Carolina.[79]

In short, South Carolina is not permitted to refute the facts presumed. Section 4 constitutes a conclusive presumption, prohibited by the Fifth Amendment.

Finally, in considering the reasonableness of the presumption established by §4, it should be remembered that, as shown, Congress could not have abolished outright all of the literacy tests across the Nation because of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution. This is now what it attempts to do in South Carolina under the guise of a "presumption".

> But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it could be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. . . .[80]

In view of its violations of the Fifth Amendment, §4 cannot be deemed "appropriate" legislation to enforce the Fifteenth Amendment.

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[78] The fact that this remedy really affords no relief from the Act and is impossible of use in practical effect is illustrated hereinafter. See p. 4.

[79] In the event of resort to this "escape clause", §4 requires South Carolina to prove the absence of discrimination for the requisite period in *all* of her political subdivisions—if misconduct has occurred in one, the entire State remains "guilty". Yet in North Carolina, Arizona and Idaho, each political subdivision is free to prove its own innocence without effect from other subdivisions.

[80] *Bailey v. Alabama*, 219 US 219, 239.

4. Sections 4, 5 and 6(b) dilute South Carolina's lawful electorate and deprive her and her citizens of their sovereign Legislature in violation of the principles of the Fifth Amendment and Article IV, Section 4 of the United States Constitution

Among the basic purposes in the formation of the Union was the preservation of the States and the protection of the democratic nature of their governments.

> . . . Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may not be unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[81]

The compact itself reflects this intent in several provisions. Among others:

> The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion. . . .[82]

Inherent in this guarantee is the restriction on the National Sovereign, that it may not itself deprive the State of its existing republican government.[83]

> That expresses the full limit of national control over the internal affairs of a State.[84]

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[81] *Texas v. White*, 7 Wall 700, 725.

[82] Article IV, §4. Under the "privileges and immunities" Clause of Article V, §2, every citizen is entitled to this Guaranty.

[83] *The Federalist*, No. XLIII (Madison), Lodge, *The Federalist*, 270-271 (1888).

[84] *South Carolina v. United States*, 199 US 437, 454.

This position involves questions of the control of the National Sovereign over the internal affairs of some States, not questions of allocation of powers within a State, or among the Federal Branches in the "political" sense, so as to be nonjusticiable.

"Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions", and no other feature

Similar principles are contained in the "due process" concepts of the Fifth Amendment. Like the restrictions on the State Legislatures under the Fourteenth Amendment, the National Legislature may not prescribe laws having the effect of depriving the inhabitants of some States of their right to exercise their functions as responsible citizens under a republican form of government:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[85]

Through the attacked provisions of the Act, Congress has undertaken to dilute the suffrage rights of South Carolina's citizens and suspend the functions of her Legislature in violation of these principles.

a. The dilution of South Carolina's electorate

From the inception of the Union, suffrage has been regarded as one of the cornerstones of the republican form of government to be preserved by the compact.

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government.[86]

Likewise from its inception the right to exercise this sovereign right has not been universal, but has been reserved to those whom the people have determined to have sufficient judgment to sustain the government.

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which could render them nonjusticiable." *Baker v. Carr*, 369 US 186, 229. Relevant also is Mr. Justice Brennen's comment in footnote 53 at page 226 in that decision:

"On the other hand, the implication of the Guaranty Clause in a case concerning Congressional action does not always preclude judicial action."

The sole issue here is the effect of this constitutional provision on the right of Congress to invade and control the internal operations of some Sovereign States.

[85] *Reynolds v. Sims*, 377 US 533, 555.

[86] "The Federalist, No. LII" (Hamilton or Madison), Lodge, *The Federalist*, 327 (1888).

> . . . As a practical fact the sovereignty is vested in those persons who are permitted by the constitution of the State to exercise the elective franchise. . . . In either case, however, it was essential to subsequent good order and contentment with the government, that those classes in general should be admitted to a voice in its administration, whose exclusion on the ground of want of capacity or moral fitness could not reasonably and to the general satisfaction be defended. . . .
>
> The theory in these cases we take to be that classes are excluded because they lack either the intelligence, the virtue, or the liberty of action essential to the proper exercise of the elective franchise.[87]

Literacy, or some ability to read and write, or a comparable factor, has always been one of the essential factors in classifying an electorate for the reason that it enables the elector to understand the problems of government.[88] The need for this judgment was recently recognized by this Court:

> The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color and sex, as reports around the world show. Literacy and intelligency are obviously not synonymous. Illiterate people may be intelligent voters. Yet, in our society when newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate could exercise the franchise . . . [Citations omitted] . . . It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage. . . .[89]

[87] *1 Cooley's Constitutional Limitations*, 82-83 (8th ed. 1927).

[88] Commonly, literacy has been waived if the citizen owns sufficient property, on the assumption that the property owner would acquaint himself with the affairs of the government to whom he paid taxes because of this ownership. Article II, §4(d) of the Constitution of South Carolina, Complaint, Par. 12, p. 7. See US Code News, p. 2597.

[89] *Lassiter v. Northhampton Board of Elections*, 360 US 45, 52.

Nor has the requirement been limited to any one section of the country.[90] Congress has itself recognized it as a necessary ingredient to the exercise of citizenship.[91]

Nor is the requirement without rational basis. Like the child of tender years, how can an illiterate elector make a rational choice between the national parties and their complicated platforms? Like the mentally incompetent, how can he judge between the local candidates? More than personality or appearance over radio or television must influence the majority of voters to prevent government from becoming a Hollywood fan club. How can the illiterate know which box to mark on the ballot, or which lever on a voting machine to pull? Can his vote be more than chance or controlled?

Of course, when the number of illiterates in a State's population become sufficiently small in comparison to the other electorate, his voice can not do serious damage to his government. Fortunately, with the modern increase in education, the illiterate is reaching this minimal status on the National level.[92] But in South Carolina illiteracy is still a major factor.

Her illiteracy rate of 20% of her population over age 25 is second only to that of Louisiana.[93] To grant the vote to

[90] *Smith v. Stone*, 159 Mass. 413, 34 NE 521 (1893); *Cofield v. Farrell*, 38 Okla. 608, 134 Pac. 407; *Rasmussen v. Baker*, 7 Wyo. 117, 50 Pac. 819 (1897); *Hill v. Hotvell*, 70 Wash. 603, 127 Pac. 211 (1912); *Franklin v. Harper*, 205 Ga. 779, 55 SE 2d 221 (1949).

[91] The requirements which Congress has imposed upon United States citizenship are much more stringent than those which South Carolina requires for the exercise of the more significant right to vote.

> No person . . . shall hereafter be naturalized as a citizen of the United States . . . who cannot demonstrate—
>
> (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . . and
>
> (2) a *knowledge and understanding* of the fundamentals of the history, and of the principles and form of government, of the United States. *8 USC 1423* [Emphasis added]

[92] See Complaint, Exh. D-2, p. 25. Even so, there is some reason for the requirement:

> At a time when alien ideologies are making a steady and insidious assault up constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to insure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the government of this country and of the States. *Darby v. Daniel*, 168 F Supp 170, 183 (SD Miss. 1958).

[93] Complaint, Exh. D-2, p. 25.

approximately 270,000 of her residents in this category would undoubtedly affect adversely the future course of her governments.[94] Similar conditions exist in the other "covered" States. Of the fifteen States with an illiteracy rate over 10%, literacy tests are suspended by the Act in eight, with four others having no such test.

Nor is this condition the choice of South Carolina and similar situate States. For over fifty years, their economy, which controls their ability to educate their populace, has been hampered and curtailed by factors beyond their control, in some instances to the benefit of other regions of the nation.[95] Only with the industrialization following World War II, and the assistance of this Court and federal regulatory agencies, *New York v. United States*, 331 US 284, is this picture now changing.

Until this change is complete, however, South Carolina's governments will be drastically affected by permitting her illiterates to vote. For this reason her citizens have, in her modern history, required a literate electorate.[96] Congress would now strike down this requirement by the Act. Beyond question, the voice and judgment of South Carolina's literate electorate would be diluted and, in close elections, possibly controlled by the unqualified electors created under the Act. In effect, the vote of the chosen electorate would be as impaired as that in cases before this Court involving other methods.[97]

The Fifth Amendment and the Guaranty Clause deprive Congress of the right to so dilute the voice of South Carolina's electorate.

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[94] Only 524,764 of her citizens voted in November 1964. See Complaint, Exh. A, p. 19.

[95] See for example, *Georgia v. Penna. Railroad Co.*, 324 US 439; Odum and Moore, *American Regionalism, A Cultural-Historical Approach to National Integration* (New York 1938); *Report to the President on Economic Conditions of the South*, National Emergency Committee (Washington 1938); Molyneaux, *What Economic Nationalism Means to The South, Foreign Policy Association World Affairs*, Pamphlet No. 4 (New York 1934); *The Inter-territorial Freight Rate Problem in the United States*, H.R. Document No. 264, 75th Congress, First Session (1937); Arnall, *The Shore Dimly Seen* (Philadelphia 1946); Parkes, *The American Experience* (New York 1947); Hawke, *Economic History of the South* (New York 1934).

[96] Article II, §4(d) of the Constitution of South Carolina of 1896. This requirement is by no means recent. See Appendix A, Complaint Brief, p. 72.

[97] See *Baker v. Carr*, 369 US 186, 208.

(b) The suspension of South Carolina's Legislature

The legislative process is essential to a republican form of government as contemplated by the Constitution.

> . . . the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people.[98]

In South Carolina, as in most States,[99] all powers not limited by the Constitution are vested in her Legislature.[100] Of course she and her sister States have granted certain powers to Congress under the Constitution, over which it may assume exclusive powers.[101] But in matters outside these areas, South Carolina's Legislature is the principal arm of her government.

Section 5 of the Act would paralyze this arm with respect to South Carolina's future elections. As previously illustrated, her Legislature is prohibited from making any change in her election laws or practices without the prior approval of the Executive or Judicial branches of the federal government. When this paralysis is coupled with the presence of federal examiners, who, in practical effect,[102] register her voters, supervise her elections and tabulate the results,[103] it becomes apparent that Congress, by the Act, has undertaken to deprive South Carolina of the right to administer her future elections.

If Congress can deprive a State of so vital a function as the administration of her elections, what limit is there on its right to regulate her other internal affairs? Plainly, such an invasion violates the Fifth Amendment and the

[98] *Duncan v. McCall*, 139 US 449, 461.

[99] *1 Cooley's Constitutional Limitations*, 175 (8th ed. 1927).

[100] *Wofford College Trustees v. Spartanburg County*, 201 SC 315, 23 SE 2d 9; *Ellerbe v. David*, 193 SC 332, 8 SE 2d 518.

[101] Compare for example *Textile Workers Union v. Lincoln Mills*, 353 US 448; *Youngstown Steel & Tube Co. v. Sawyer*, 343 US 579.

[102] See page 12.

[103] Sects. 8 and 12(c) of the Act. Complaint Brief, Appendix B, p. 87-88, 92-93.

Guaranty Clause, in view of which, the Act cannot be termed "appropriate".

In summary, these particular provisions of the Act, whether or not they accomplish the purposes of the Fifteenth Amendment, specifically infringe upon rights and powers reserved to South Carolina and her inhabitants under other equally essential provisions of the Constitution.

B. THE CHALLENGED PROVISIONS OF THE ACT ARE NOT REASONABLY DESIGNED TO ENFORCE THE FIFTEENTH AMENDMENT

The grant of power to Congress under the Fifteenth Amendment is narrow and precise—that of preventing racial discrimination in voting. Any legislative attempt to exercise this power must confine itself to the bounds of this grant and be reasonably designed to accomplish its purpose.[104] The grant itself specifically contains such a restriction.[105] The constitutional term "appropriate" has been defined as "belonging peculiarly . . . fit or proper; suitable".[106]

But even were such a specific limitation not present, its nature would require it to be inferred:

> Recognition of this principle cannot justify attempted exercise of a power clearly beyond the true purpose of the grant.[107]

Apart from a consideration of their violation of other provisions of the Constitution, §§4, 5, 6(b), 11 and 12 of the Act do not meet this standard.

The Fifteenth Amendment is nationwide in its scope.[108] Its prohibition is directed against "the United States" and "any State". The problem which it sought to remedy was

[104] See *Perez v. Brownell*, 356 US 44.

[105] Sect. 2 of Article XV. Complaint Brief, Appendix B, p. 79.

[106] Webster's *New Twentieth Century Dictionary*, p. 88 (Unabridged Ed. 1956).

[107] *Railroad Retirement Board v. Alton Railroad Co.*, 295 US 330.

[108] This of course must be true of all constitutional provisions. *King v. Mullins*, 171 US 404; *Davis v. Burke*, 179 US 399.

not limited to any one region or State.[109] To be "appropriate", any legislation under the provision should, like the grant and the problem, be nationwide in form. As previously illustrated, §§4, 5 and 6(b) are not. The Act's history leaves no doubt that they were carefully limited to a few particular states.[110]

Neither does this limited application affect the areas where, according to the evidence presented to Congress, the problem sought to be cured exists. These "trigger" sections cover Alaska, parts of Arizona and Idaho (and possibly Maine) where the Negro population is infinitesimal, as well as South Carolina and Virginia where the defendant admits no "massive" discrimination has occurred.[111] Yet they failed to reach areas where such discrimination was said to exist.[112]

Like that of the Fourteenth Amendment, the grant of the Fifteenth Amendment is prohibitive in nature:

> Its function is negative, not affirmative, and it carries no mandate for a particular measure of reform.[113]

The proscription is that the right ". . . to vote *shall not be denied*". Yet these sections affirmatively *create* a right for citizens of some states to vote, in the teeth of this Court's statement that:

> The Fifteenth Amendment does not confer the right of suffrage upon anyone.[114]

The prohibition is that the protected right shall "not be denied . . . on account of *race*". As this Court only recently noted, illiteracy is colorblind.[115] If, in the covered States, there are more Negroes in this category, the same

[109] See for example the sources of earlier cases before this Court. *James v. Bowman*, 190 US 127 (Ky.); *Ex Parte Seibold*, 100 US 371 (Md.); *Ex Parte Yarborough*, 110 US 651 (Ga.).

[110] See, throughout, Hearings, H.R. 6400, and S. 1564.

[111] See footnote 57, p. 18.

[112] For example, Florida, Texas, Arkansas, Kentucky, Tennessee. Footnote 55, p. 18.

[113] *Owenby v. Morgan*, 256 US 94, 112. Cf. *Slaughterhouse Cases*, 16 Wall 36, 77; *U.S. v. Cruikshank*, 92 US 542, 554.

[114] *U.S. v. Reese*, 92 US 214, 217.

[115] *Lassiter v. Northhampton Board of Elections*, 360 US 45, 52.

may be true of convicted felons, or residents under the voting age. Yet in none of these classifications is race a factor. If one can be stricken down under the authority of the Fifteenth Amendment, so could they all. But this authority is limited to *racial* discrimination.

Broad provisions of §§11 and 12 concerning elections apply to the conduct of all inhabitants, regardless of race or the intent of the conduct to affect race.[116] Construing the similarly conditioned grant of Congressional authority under the Thirteenth Amendment, this Court said, in holding one of the original Civil Rights Acts excessive:

> It covers any conspiracy between two free *white* men against another free *white* man to deprive the latter of any right accorded him by the laws of the State or by the United States. A law under which two or more free *white* private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free *white* citizen of a right protected by the law of the State to all classes of persons . . . cannot be authorized by the Amendment which simply prohibits slavery and involuntary servitude.[117]

The Amendment prohibits the discrimination by "any *State*". Again, the criminal provisions of §§11 and 12 apply alike to the conduct of both private individuals and officials of the Sovereign. Until now, this Court has consistently held that Congressional authority under the Amendment, like that of the Fourteenth Amendment, is limited to "State action" and does not extend to the purely private conduct of private individuals.

> These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of power conferred by the Fifteenth Amendment upon Congress to prevent

[116] Complaint Brief, Appendix B, p. 91-92. The sections are drawn in terms of "no person" and "whoever", without qualification.

[117] *U.S. v. Harris*, 106 *US* 629, 641. [Emphasis added].

action by the State through some one or more of its official representatives.[118]

Finally, inherent in the Congressional grant of authority of the Fifteenth Amendment is the limitation that this authority be used sparingly, and only to the extent necessary to accomplish its purpose.

> The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.[119]

As heretofore illustrated, these sections completely preempt South Carolina's voter registration qualifications and procedures and the administration of her elections. Such attempted changes in a State's lawful proceedings have previously been turned down as excessive under the Fifteenth Amendment.

> The statute contemplates a most important change in election laws. Previous to its adoption, the States, as a general rule, regulated in their own way, all the details of all elections. They prescribed the qualifications of voters and the manner in which those offering to vote at an election to make known their qualifications to the officers in charge. This Act interferes with this practice and prescribes rules not provided by the laws of the States. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector presents his affidavit in

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[118] *James v. Bowman*, 190 US 127, 139, Cf. *Smith v. Allwright*, 321 US 649; *Guinn v. U.S.*, 238 US 347; *U.S. v. Reese*, 92 US 214; *Ex Parte Seibold*, 100 US 371; *U.S. v. Cruikshank*, 92 US 542. The Congressional statute involved in *James v. Bowman* is strikingly similar to §11(b) [Complaint Brief, Appendix B, p. 91] and read:

> Every person who prevents, hinders, controls or intimidates others from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats, or of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

Application of this established limitation of the Fourteenth Amendment has been much before this Court in recent years. See for example, *Robinson v. Florida*, 378 US 153; *Peterson v. City of Greenville*, 373 US 244.

[119] *Aptheker v. Secretary of State*, 378 US 500, 508.

the form and to the effect prescribed, the inspectors are to treat this as the equivalent of a specified requirement of a State law. *This is a radical change in the practice.* . . .[120]

But these are not the only excessive features of the Act. Under §14(b),[121] *all* courts are closed to South Carolina and her citizens, except the United States District Court in the District of Columbia, for any matters pertaining to the application of the Act. To question any conduct of a federal examiner, they must travel to Washington, bringing only those witnesses who will voluntarily accompany them.[122] Presumably, the resolution of any contested elections involving any application of the Act or the eligibility of the voters it creates, must take place in Washington, no matter how local or relatively unimportant the office or how small the community involved.[123] After 175 years the reported predictions of a Great Patriot, that entry into the Union could result in the citizens being dragged to Washington to assert their rights in the first instance, would appear to be true.[124]

Even the House sub-committee Chairman termed the provision "harsh."[125] Many of the most avid supporters of some corrective legislation deplored the challenged sections.[126]

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[120] *U.S. v. Reese*, 92 US 214, 219 [Emphasis added]. Compare the provisions of §§6 and 12(e) authorizing the suspension of State procedures and the invocation of Federal tabulation of election results on the basis of "affidavits" to the similar provisions in the Civil Rights Act there considered.

[121] Complaint Brief, Appendix B, p. 94.

[122] Without Court approval, no subpoenas may be issued for witnesses over 100 miles distant from the District., Sect. 14(d), Complaint Brief, Appendix B, p. 94-95. Why?

[123] This requirement unquestionably violates any sense of fairness or real procedural "due process". While Articles II and III of the Constitution vest jurisdiction of the federal courts in Congress, there is no precedent in the history of the Union for such an abuse of this power. No comfort can be found in the temporary Emergency Price Control legislation of World War II, designed to meet the needs of the Nation in crisis. *Lockerty v. Phillips*, 319 US 182; *Bowles v. Willingham*, 321 US 503. This legislation is *permanent* and no such crisis exists.

[124] Patrick Henry. Hearings, H.R. 6400, Ser. 2, p. 560.

[125] Hearings, H.R. 6400, Ser. 2, p. 62.

[126] See for example US Code News, p. 2535-2552 and the testimony reported in the *Hearings* throughout.

Nor does the legislative history reveal any justification for such drastic legislation. Resort had barely been had to existing legislation, only recently passed.[127] Great progress was occurring, even in the areas where the problem was said to be the greatest.[128] Nor was the problem new. According to the Defendant, it had existed for over ninety-five years.[129] But only in recent years had Congress and the Executive branch sought to remedy the situation.[130] This long-standing inaction of federal authority and the impatience with lawful new legislation cannot justify these drastic measures.[131]

Sections 4, 5, 6(b), 11 and 12 of the Act are not reasonably designed to enforce the Fifteenth Amendment and therefore are not "appropriate" legislation.

II

THE ACT CONSTITUTES A LEGISLATIVE TRIAL IN VIOLATION OF ARTICLE I, §9 AND ARTICLE III

In considering the effect of Article I, §9 and Article III on the validity of the Act, it is again necessary to begin with the fundamental design of the Union. The governmental powers granted by the Sovereign and formerly independent States were divided into three distinct categories, with the whole of each category being delegated to a separate department of the government of the National Sovereign—Executive, Judicial and Legislative.[132] The ob-

[127] See footnote 143, p. 40; Hearings, S. 1564, Pt. 1, p. 105-108; H.R. 6400, Ser. 2, p. 75-77, 403. No suits have been brought in South Carolina. S. 1564, Pt. 1, p. 39.

[128] US Code News, p. 2537.

[129] Hearings, H.R. 6400, Ser. 2, p. 3-5. Chairman Celler said 100 years. H.R. 6400, Ser. 2, p. 369.

[130] See footnote 143, p. 40.

[131] See *Ex Parte Milligan*, 4 Wall 2, 120-121; *Schecter Poultry Corp. v. U.S.*, 295 US 495, 528-529.

[132] Article I, §1. "All legislative powers herein granted shall be vested in Congress . . ."

Article II, §1. "The executive power shall be vested in a President . . ."

Article III, §1. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

vious purpose of the design was to prevent the concentration of these vast powers in one body where they could be overzealously used to endanger the liberty of the government.[133]

In order to accomplish this purpose it was essential to the design that the powers of one branch not be exercisable by another.[134] Particularly did the compact authors fear excessive reach by the legislative arm:

> But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.[135]

While it has been suggested that there was no need for specific prohibition against any such legislative excess, since the grants of power carried within themselves inherent protective restrictions,[136] this Court only last term recognized that specific prohibition against an exercise of the judicial function by the Congress was enunciated in §9 of Article I.

> The best available evidence, the writings of the architects of our constitutional system, indicates that the bill of attainder clause was intended not as a narrow technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the

[133] "The Federalist, No. XLVII" (Madison); Lodge, *The Federalist*, 299-307 (1888); *United States v. Brown*, 381 US 487, 14 L. ed. 2d 484, 488.

[134] *Ibid.* "No. XLVIII" (Madison), 308-313.

[135] "The Federalist No. XLVIII" (Madison), Lodge *The Federalist* 309 (1888).

[136] *1 Cooley's Constitutional Limitations*, 355-359 (8th ed. 1927).

separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.[137]

The history of this Union has proven that such legislative restraint was indeed necessary to protect against inflamatory outrages of segments of our citizenry directed, *rightfully* or *wrongfully*, toward others in this land of liberty.[138]

Two classic examples of such legislative abuse are found in the bitter backwash following the Civil War. By its Reconstruction Constitution, Missouri sought to ban from many phases of public office, employment and professions, those who had either openly or covertly opposed the Union, by requiring, as a prerequisite to their position, an oath revealing the activities, sympathies and desires of the individual at the time of the strife. This past conduct was absolutely condemned. Said this Court in *Cummings v. Missouri*, 4 Wall 277:

> The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punish-

[137] *U.S. v. Brown*, 381 US 437, 14 L ed 2d 484, 488. The subsequent passage of the Fifteenth Amendment was never intended to change this separation of powers. Sect. 2 thereof reads:

> The Congress shall have power to enforce this Article by appropriate *legislation*. [Emphasis added]

[138] *U.S. v. Brown*, 381 US 437, ___, 14 L ed 2d 484, 490. This function was recognized by two members of this Court in one of its earlier decisions. In reviewing the history and reasons for the attainder and *ex post facto* clauses in *Calder v. Bull*, 3 Dall 386, Mr. Justice Chase, for the majority, said:

> The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, Federal and State legislatures were prohibited from passing any bill of attainder or any *ex post facto* law. p. 389.

In his separate opinion, Mr. Justice Iredell put it even more vividly:

> Rival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments of justice; while attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph. The temptation to such abuses of power is unfortunately too alluring for human virtue. p. 399-400.

ment conditionally. . . . The Constitution . . . intended that the rights of a citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. p. 325

Nor did the National legislature escape this vindictive passion. In order to practice in the federal courts, Congress required all attorneys to swear that they had never borne arms against the Union during the rebellion, regardless of any executive pardon. Again this Court struck down such "legislative adjudication", holding the "attainder clauses" applicable to Congress, thus prohibiting this abortion of the federal design. *Ex Parte Garland*, 4 Wall 333.

Our times have seen similar reaction by Congress to popular feeling. Following the tragedy of World War II, this country awoke to find itself confronted by a sinister worldwide conspiracy dedicated to its extinction, apparently openly sponsored by some of its citizens through the American Communist Party. Popular reaction was urgent, resulting in numerous Congressional attempts to expose all members of the party, and rout them out of all employment affecting the national security.[139]

Among the first such bills to be construed by this Court was §304 of the Urgency Deficiency Appropriations Act of 1943, purporting to deprive certain federal employees of further government salaries because of prior questionable Communist associations and backgrounds. *United States v. Lovett*, 328 US 303. The language of Mr. Justice Black, speaking for the majority in striking down this attempted exercise of the judicial function is most noteworthy here:

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take

[139] For example, 62 Stat. 808 (1948); 64 Stat. 987 (1950); 68 Stat. 775 (1954); 76 Stat. 91 (1962).

away the life, liberty or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts . . .

When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. p. 317, 318.

Recently, the attainder provisions were again invoked to prevent legislative condemnation and punishment of the Communist party, though after a temporary lapse.[140] In *United States v. Brown*, 381 US 437, the majority concluded that §404 of the Labor Management Act of 1959 decreeing criminal the service of a member of the Communist party as an officer or employee of the labor union offended the attainder clauses.[141]

Quite parallel and analagous to this popular reaction was the strong upsurge in feeling of public concern over the status of the Negro in American society. Sparked by such decisions of this Court as *Shelly v. Kraemer*, 334 US 1; *Brown v. Board of Education*, 347 US 483; *Burton v. Wilmington Parking Authority*, 365 US 715, and *Peterson v. Greenville*, 373 US 244, the movement to insure equal participation of the Negro in public life exceeded proportions capable of the imagination twenty years ago. As a result, Congress, after a slow start,[142] began in earnest to grant

[140] During the intervening period when the attainder clauses were not invoked, this Court sharply divided when faced with other legislation on this subject. Cf. *American Communications Assn. v. Douds*, 339 US 382 (3-1-1-1); *Fleming v. Nestor*, 363 US 603 (5-4); *Garner v. Bd. of Public Works*, 341 US 716 (5-2-2); *Scales v. U.S.*, 367 US 203 (5-4); *Communist Party v. Subversive Activities Control Board*, 367 US 1 (5-4); *Noto v. U.S.*, 367 US 290 (5-2-2). It is noteworthy that some of this legislation directed to Communist party membership was voided on other grounds closely akin to a "legislative trial". Cf. *Aptheker v. Secretary of State*, 378 US 500. See p. 15 to 24.

[141] This reaction to the hidden enemy that would overthrow our Republic even led Congress to turn on those who invoked his individual rights under the Fifth Amendment. Cf. *Steinberg v. U.S.*, 163 F Supp 590 (Ct. of Cl. 1958) striking down 5 USC 740(d).

[142] No recent important Congressional action occurred before 1957.

equality to the Negro.[143] Because of this momentum of inflamed public opinion, the Act was passed.[144]

The reason for its enactment and manner of its passage are most indicative of the Act's purposes. It was introduced on March 17, 1965 and passed on August 6, 1965, an amazingly short period for legislation of such import. The sub-committee hearings before both Houses were limited to a combined total of only 18 days, at the insistence of the sub-committee chairmen.[145] The territories to which the Act would be applicable were carefully delineated, and sixty-four Senators, presumably from unaffected areas, sponsored its passage.[146] Its sponsors and promoters admitted that it was "drastic" and could not have been enacted if nationwide in its application.[147] Recently enacted existing legislation, to which only bare resort had been had, was termed too time-consuming and expensive,[148] even though the maladies to which it was directed allegedly had existed for over ninety-five years.[149] Its purpose was described as that of reaching areas of "invidious massive discrimination", even though the innocent were caught up.[150] At the time of its consideration, the nation was witnessing an extended and widely publicized protest demonstration over voter registration in one of the allegedly "guilty" areas.[151] Against this background the Act must be judged.

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[143] 71 Stat. 637 (1957); 74 Stat. 90 (1960); 78 Stat. 241 (1954).
It is noteworthy that one of the earlier decisions of this Court prohibiting "judicial trials" struck down Congressional legislation directed against a racial group. *Wong Wing v. U.S.*, 163 US 228.

[144] US Code News, p. 2538.
For the most part, this Court has to date rejected, in this field, resulting attempts to convince the judiciary to uproot unquestionably basic principles of the compact. Cf. *Lassiter v. Northhampton Bd. of Elections*, 360 US 45; *Bell v. Maryland*, 378 US 226.

[145] Hearings, H.R. 6400, Ser. 2, p. 1-2; S. 1564, Pt. 1, p. 4.

[146] Hearings, H.R. 6400, Ser. 2, p. 29; S. 1564, Pt. 2, 1458-1461; US Code News 2610.

[147] Hearings, H.R. 6400, Ser. 2, p. 403, 466, 500-502; US Code News, p. 2540.

[148] See fn. 142, p. 39 and see Hearings, H.R. 6400, Ser. 2, p. 76-77.

[149] See fn. 128, p. 35.

[150] Hearings, H.R. 6400, Ser. 2, 85-86, 105, 259.

[151] Selma, Alabama, where publicity on the demonstration began in January 1965 and began to end in mid-April 1965. *"Time"*, Jan. 29, 1965, p. 20; *"U.S. News & World Report"*, March 8, 1965; *"Time"*, March 26, 1965, p. 20; *"U.S. News & World Report"*, March 29, 1965, p. 27; *"U.S. News & World Report"*, April 5, 1965, p. 37; *"U.S. News & World Report"*, April 12, 1965, p. 86-88. The hearings were replete with references to events there.

The classic definition of "legislative trial", as outlawed by the attainder clause, is

> A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.[152]

By the Act, Congress has adjudged South Carolina and her citizens guilty of using her literacy requirements to prevent her Negro populace from registering to vote.[153] She and her citizens have received no judicial hearing and have had no opportunity to confront their accusers or rebut their evidence. No court, state or federal, has concluded that she, or her citizens so abrogated the provisions of the Fifteenth Amendment.

The Act has predetermined application only to a limited class—South Carolina, her citizens and those of nine other Sovereign States.[154] The size of this class does not excuse the fact that it is limited. *U. S. v. Brown*, 381 US 437,—— 14 L ed 2d 484, 499. Other Sovereign States whose citizens have prescribed similar literacy requirements are not so proscribed—their right to be governed by the voice of a literate electorate remains untouched.

Nor can there by any serious doubt of the punitive design of this Act. Not only do South Carolina citizens lose their right to be governed by a literate electorate, but they forfeit their right to control or further improve the regulations of all phases of their elections. She, and her citizens are so restricted not because of any conduct violative of the Fifteenth Amendment which may have existed at the time of the Act's passage (or immediately prior thereto), but for any such discrimination which may have existed for 5 years previous thereto.[155]

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[152] *Cummings v. Missouri*, 4 Wall 277, 323.

[153] That the "covered" states stand condemned was admitted by the Defendant. Hearings, S. 1564, Pt. 1, p. 45, 83-86, 88-93.

The validity of this position is not dependent upon a conclusion that the Act's presumption is arbitrary.

[154] It is unnecessary for the Court to meet any suggestion that the attainder clause affords no protection to Sovereign States. While the purpose of this constitutional clause, as drawn from the compact design, would refute such a distinction, the Plaintiff, as *parens patriae*, is here also asserting the individual rights of her citizens.

[155] Compare the reaction of this Court to a similar proposition in *U.S. v. Brown*, 381 US 437, ——, 14 L. ed. 2d 484, 497.

The Defendant undoubtedly will contend that the Act was designed to prevent future discrimination, not to punish South Carolina's citizens by depriving them of a literate electorate and control of their elections. The Act, stripped of the sections to which objection is here made, would still accomplish that purpose.

In any event, the absolute deprivation of basic rights because of alleged past actions in order to prevent future misconduct is clearly "punitive".

> One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any less the punishment.[156]

As he suggested to Congress, the Defendant will probably contend that no punishment is involved since South Carolina and her citizens are free to avoid the provisions of the Act by seeking a declaratory judgment as to their conduct from a three-judge court in the United States District Court for the District of Columbia. In taking this position, the Defendant must necessarily concede that, if any such attempt is successful, South Carolina's voter registration rolls may be purged of the thousands of illiterates which have been placed thereon since August 1965. Otherwise the vote of her lawful electorate would remain permanently diluted by the illiterates already registered at his discretion and by his examiners.

Nor is such a remedy "adequate" in any sense of the word. The Defendant described its mechanics:

> Look how this would work. In point of fact, the State could come in and simply have an affidavit, say there has never been any discrimination in the state on racial ground. If that affidavit was not tested and if evidence was not put in by the United States, there would be nothing before the Court to indicate that there had been discrimination and I would think that that in itself would carry the burden.

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[156] *U.S. v. Brown*, 381 US 437, ..., 14 L ed. 2d 497.

> I think it would be encumbent upon the United States at that point—after really a simple statement that there had not been discrimination—be encumbent upon the United States to put in evidence that there had been. *It would then be encumbent upon the state to rebut that evidence and to carry the burden.*[157]

How would South Carolina carry this burden? How does any state prove it is completely free of discrimination? While South Carolina denies any systematic, widespread or massive discrimination against her Negro citizens with respect to their right to vote, such incidents undoubtedly have occurred from time to time, as in all states of the Union where substantial racial or foreign national origins minorities exist.[158] Apparently she would remain guilty as charged if *any* such incidents had occurred. In short, the "remedy" is impossible.

In any event, ability to escape the penalty does not lessen the invalidity of the legislative adjudication.

> We do not read either opinion to have set up inescapability as an absolute prerequisite to a finding of attainder.[159]

Reliance will undoubtedly be placed upon several decisions intervening between *Brown* and *Lovett*. While *Brown* casts a serious shadow over their present authority,[160] they are distinguishable. In *American Communications Assn. v. Douds*, 339 US 382, the proscribed class was free to disavow present Communist connections and avoid the proscription. South Carolina cannot now promise to prevent future discrimination and remove itself from the penalties of the Act. Similarly, in *Garner v. Bd. of Public Works*, 341 US 716, the individual's employment was not threat-

[157] The Defendant, Hearings, S. 1564, Pt. 1, p. 26-27. [Emphasis added]

[158] As the Defendant quite candidly admitted before Congress:

"I don't think that all areas of the country are free of prejudice, and I think it is possible that in any state of this country Negroes may have been discriminated against from time to time. They may be discriminated against now." Attorney General Katzenbach, *Hearings*, H.R. 6400, Ser. 2, p. 27.

[159] *U.S. v. Brown*, 381 US 437, ____, 14 L. ed. 2d 484, 492, fn. 32.

[160] See Ibid. 437, ____, 498.

ened if the prohibited activity was discontinued after the adoption of the city charter provisions. In both *Deveau v. Braisted*, 363 US 144 and *Fleming v. Nestor*, 363 US 603 no element of punishment was involved since the legislation was not directed to the prior conduct of the individuals. Furthermore in both cases the prior conduct of the individual had been subjected to a judicial or quasi-judicial proceeding.[161] No mention has been made of *Communist Party v. Subversive Activities Control Board*, 367 US 1 in view of this Court's recent decision in *Albertson v. Subversive Activities Control Board* — US — 34 L. W. 4014.

Whatever the evil sought to be remedied, whatever the pressing urgency for remedial legislation, Congress may not cross the basic constitutional divisions into the realm of the judiciary. Sections 4, 5 and 6(b) of the Act reflect a "legislative trial" of the citizens and governments of South Carolina and certain of her sister Sovereign States, and, as such, abrogate the fundamental law of the Republic.

CONCLUSION

This action does not question whether the first session of the 89th Congress of the United States should have acted to enforce the Fifteenth Amendment. Corrective legislation may or may not have been needed. Basically this challenge is not directed to the need for legislation, but to the manner in which Congress has determined to act.

The manner chosen is unique in legislative history, involving a "trigger" mechanism geared by past innocent conduct to apply automatically to a few selected States, suspending their control of their most essential internal workings. Regrettably, this legislative approach has been first employed in connection with the right held basic by all to the preservation of the Union—the right to vote. Some would prefer that another subject had been chosen to test the fiber of the Constitution against such Congressional action.

[161] Conviction of felony. *Deveau v. Braisted*, supra. Deportation. *Fleming v. Nestor*, supra.

Yet, if, in the judgment of this Court, Congress can, in this area so vital to the governments and inhabitants of all States,

> .... fetter and degrade the State governments by subjecting them to control of Congress and the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character ....[162]

no other topic could make that fact clearer.

We respectfully suggest that, in one of the rare occasions of our history, by the challenged sections of the Act, the Congress has ignored its responsibility to abide by Constitutional boundaries. This proceeding is brought with the confident belief that this Court will not so abdicate its function under the Compact.

For these reasons the relief requested should be granted.

Respectfully submitted,

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December 1965

[162] *Slaughterhouse Cases* 16 Wall 36, 78.

APPENDIX C

In the various studies on group differences and voting there are several standard groupings which are employed for illustrating differentials in voter participation. Five of the primary groupings employed are:

1. **Education**
2. **Income**
3. **Age**
4. **Size of Community**
5. **Religion**

Variations in voter participation within these groups have been examined in several recent studies on voter behavior, with substantially identical conclusions reached.[1] Date in the tables below refer to *non-voting* in national elections.[2]

1. Education

TABLE I

Relation of Educational Attainment to Non-voting

	1948	1952	1954	1964
Grade School	44%	38%	62%	32%
High School	33	20	53	23
College	20	10	40	11

The figures show clearly that the lower the level of educational attainment the lower the voter participation. For the United States as a whole, the median years of school

[1] Angus Campbell and Homer C. Cooper, *Group Differences in Attitudes and Votes* (Survey Research Center, Institute for Social Research, University of Michigan, 1956); Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes, *The American Voter* (New York: John Wiley & Sons, 1960); V. O. Key, Jr., *Public Opinion and American Democracy* (New York: Knopf, 1964); Lester W. Milbrath, *Political Participation* (Chicago: Rand McNally & Co., 1965).

[2] Figures for the elections of 1948, 1952 and 1954 are taken from Angus Campbell and Homer C. Cooper, *Group Differences in Attitudes and Votes*, Chapter 3. Figures for the election of 1964 are taken from U. S. Bureau of the Census, Current Population Reports: *Population Characteristics*, "Voter Participation in the National Election November 1964," Series P-20, No. 143, October 25, 1965.

completed by persons 25 years old and older are 10.6.[3] For South Carolina as a whole the median years of school completed by such persons are 8.7. (For white persons the figure in South Carolina is 10.3 years, and for non-white persons the figure is 5.9 years.)[4]

2. Income

TABLE II
Relation of Total Family Income to Non-voting

	Under $2000	$2000-2999	$3000-4999	$5000-7499	$7500-9999	$10,000 or more
1954	67%	57%	53%	49%	47%	35%
1964	50	41	37	27	21	15

The figures show clearly that the lower the level of family income the lower the voter participation. For the United States as a whole the median family income in 1959 was $5,660.[5] For South Carolina as a whole the median family income was $3,821.[6]

3. Age

TABLE III-a
Relation of Age to Non-voting

	21-24	25-34	35-44	45-54	55-64	65 & over
1954	77%	63%	51%	43%	49%	51%
1964	47	35	26	23	23	33

TABLE III-b
Percentage Distribution of Population by Age

	20-24	25-34	35-44	45-54	55-64	65 & over
U. S.[7]	6.0	12.8	13.5	11.5	8.7	9.2
S. C.[8]	7.0	12.5	12.6	9.8	6.4	6.3

[3] U. S. Census: 1960, Vol. 1, *Characteristics of the Population*, Pt. 1, U. S. Summary, Table 76, p. 1-207.
[4] U. S. Census: 1960, Vol. 1, *Characteristics of the Population*, Pt. 42, South Carolina, Table 47, p. 42-96.
[5] U. S. Census: 1960, *supra*, n. 3, Table 137, p. 1-286.
[6] U. S. Census: 1960, *supra*, n. 4, Table 142, p. 42-377.
[7] U. S. Census: 1960, *supra*, n. 3, Table 45, p. 1-146.
[8] U. S. Census: 1960, *supra*, n. 4, Table 17, p. 42-28.

Table III-a indicates substantial differentials in voter participation among the various age groups. The lowest rate of voter participation is found in the 21-24 year age group. The highest rate of voter participation is found in the three groups covering ages 35-64.

Table III-b shows that by comparison with the national pattern, South Carolina has a larger percentage of its population in the age group with low voter participation and a markedly smaller percentage of its population in the age groups with high voter participation.

4. Size of Community

TABLE IV

Relation of Size of Community to Non-voting

	1948	1952	1954
Metropolitan Area	17%	21%	51%
City or Town	38	27	52
Open Country	59	32	65

Campbell and Cooper, *Group Differences in Attitudes and Votes*, states: "As for voting turnout, the trend over three elections is that of higher voting rates as community size increases. People living in the open country have clearly the poorest voting record over this period." (At. p. 26.)[9]

For the United States as a whole, the population distribution in 1960 was 69.9% urban and 30.1% rural.[10] For South Carolina in 1960 the distribution was 41.2% urban and 58.8% rural[11] a substantially greater orientation toward the non-participating voter category than the national pattern.

[9] See also Lester W. Milbrath, *Political Participation* (Chicago: Rand McNally & Co., 1965), p. 128.

[10] U. S. Census: 1960, supra, n. 3, Table 44, p. 1-144.

[11] U. S. Census: 1960, supra, n. 4, Table 14, p. 42-21.

5. Religion

TABLE V

Relation of Religion to Non-voting

	1948	1952	1954
Protestant	43%	28%	56%
Catholic	20	15	44
Jewish	*	7	47

* The Jewish sample in 1948 was not large enough to justify consideration.

Table V shows that of the three general categories Protestants have the lowest voter participation, Catholics have somewhat greater participation, and Jews slightly greater than Catholics, although the 1954 percentage is a different and, according to general voter studies cited earlier, aberrant figure.

Statistics on religious affiliation are relatively unreliable, but the World Almanac for 1963 shows that for the United States as a whole, of those persons who are members of a religious body, 55% were Protestant, 37% were Catholic, and 5% were Jewish.[12] For South Carolina, of those persons who are members of a religious body, 96.8% are Protestant, 2.6% are Catholic, and 0.4% are Jewish.[13] Relative to church membership population South Carolina is almost entirely Protestant—the category which shows the lowest voter participation.

[12] *The World Almanac 1963* (New York: New York World-Telegram Corp'n. 1963). pp. 705-706.

[13] *The Columbia Record*, December 1, 1965, Sec. B, p. 1, cols. 7-8. Figures reported in the *Record* were taken from those compiled by the South Carolina Christian Action Council.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

STATE OF SOUTH CAROLINA,
Plaintiff,

vs.

NICHOLAS de B. KATZENBACH, Attorney General
of the United States,
Defendant.

BRIEF

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No. 22, Original.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

STATE OF SOUTH CAROLINA,
Plaintiff,

vs.

NICHOLAS de B. KATZENBACH, Attorney General
of the United States,
Defendant.

BRIEF

On Behalf of the State of Georgia as Amicus Curiae.

I.

INTEREST OF THE STATE OF GEORGIA.

Pursuant to the order of this Court of November 5, 1965, extending invitation to any state to submit brief, *amicus curiae,* 34 Law Week 3160, the State of Georgia herewith submits its brief in support of the complaint of the plaintiff, South Carolina.

At the outset, the position of this amicus curiae should be made clear in several respects.

Denial of the right to vote because of racial considerations is no more the policy of Georgia than it is of the United States. Only last year, the General Assembly of

Georgia for the first time in the state's history undertook a comprehensive revision of the election laws to the end that election frauds of every description shall no longer be tolerated.[1] No reports of denials of the right to register or vote have been called to the attention of state authorities in over six years, but should such contingencies arise, State law now affords adequate machinery to correct any abuses.[2]

Second, the *amicus curiae* concedes the power and propriety of Congress' undertaking to fulfill its responsibilities in affording to all citizens the rights guaranteed by the Constitution of the United States. But the proper remedy for one evil discrimination is to eradicate it, and not to supplant it with another even more invidious in character. And to this we may add that the Constitution can never be vindicated in one area by transgressing its clear provisions in another, whatever the hysteria which happens to engulf the beleaguered body of law-makers at any given time.

Third, Georgia, as one of the seven states,[3] brought under Section 4 of the Voting Rights Act, has a vital interest in assuring that its electoral processes be not debilitated by those deemed incompetent to participate in the decisions of government. Only recently, this Court acted decisively in striking down the Georgia County Unit System on the ground that it operated to dilute the vote of some citizens and thereby denied equal protection. **Gray v. Sanders**, 372 U. S. 368, 9 L. Ed. 2d 821 (1963) and cf. **United States v. Saylor**, 322 U. S. 385, 88 L. Ed. 1341 (1944). Here, the dilution is even more egregious. The complex problems of the Twentieth Century demand an enlightened electorate. Now is hardly the time to experiment with ignorance and incompetency.

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[1] Ga. Laws 1964 Ex. Sess., p. 26.

[2] Id., Sections 34-202, 34-203, 34-903, 34-904.

[3] 30 Federal Register 9897, 10 Race Rel. L. R. 1397 (1965).

II.

SUMMARY OF ARGUMENT.

1. The Act Is Unconstitutional as Being in Violation of Article I, Section 2, and the Seventeenth Amendment. Section 4 of the Act, in purporting to suspend the literacy and other tests imposed as a prerequisite to voting or registering to vote in certain states is unconstitutional because there is no delegation of power in the Constitution to support it, and because such provision also violates Article I, Section 2, and the Seventeenth Amendment, which declare that electors in federal elections shall have the qualifications requisite for the most numerous branch of the state legislatures. Under Art. II, Section 1, as amended by the Twelfth Amendment, qualifications of voters who select presidential electors are also defined by state law. The United States is a government of delegated powers only. **United States v. Harris**, 106 U. S. 629, 27 L. Ed. 290 (1883); Tenth Amendment to the Constitution. In a long line of decisions, this Court has never departed from the proposition that the qualifications of electors are fixed by state law, subject only to exceptions not relevant here. **Minor v. Happersett**, 21 Wall. 162, 22 L. Ed. 627 (1875); **The Federalist**, No. 60; **McPherson v. Blacker**, 146 U. S. 1, 36 L. Ed. 2d 869 (1892); **Gray v. Sanders**, 372 U. S. 368, 9 L. Ed. 2d 821 (1963); **Baker v. Carr**, 369 U. S. 186, 243, 7 L. Ed. 2d 663 (1962); **Carrington v. Rash**, 380 U. S. 89, 13 L. Ed. 2d 675 (1965). This power has not been abrogated by any amendment adopted subsequent to the adoption of the original Constitution, **Newberry v. United States**, 256 U. S. 232, 248, 65 L. Ed. 913 (1921), and in any event, the Seventeenth Amendment, adopted subsequent to the Fourteenth and Fifteenth Amendments, is the last expression, and constitutes a recognition by Congress and the people of the position urged here. Nor can the Act be supported by Article I, Section 2, relating to Congress'

power to regulate the "times, places and manner of holding elections." **Newberry v. United States,** supra; **4 Elliot's Debates 71; The Federalist,** No. 59. Nor can the Act be sustained as "appropriate legislation" under Section 2 of the Fifteenth Amendment, as Congress' power under that Section does not exceed its authority under Section 1, which limits it to a proscription of discrimination by state action based upon race or color. **Civil Rights Cases,** 109 U. S. 3, 13, 27 L. Ed. 835 (1883); **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588 (1876); **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876). The Act also can not be sustained under the "necessary and proper" clause (Art. I, Sec. 8, Cl. 14). **Kinsella v. United States ex rel. Singleton,** 361 U. S. 234, 247, 4 L. Ed. 2d 268 (1960).

Literacy and other like tests have long been recognized as a valid qualification for voting under state law, and are not discriminatory as to race. **Lassiter v. Northampton County Board of Elections,** 360 U. S. 45, 3 L. Ed. 2d 1072 (1959). Discrimination in administration is possible under any law, but this does not invalidate the law itself. The presumption of state discrimination sought to be established by Section 4 (b) of the Act is itself unconstitutional because (1) it is arbitrary and is not supported by a rational connection between the fact found and the fact presumed. **Bailey v. Alabama,** 219 U. S. 219, 55 L. Ed. 191 (1911)-(2). The presumption also violates the separation-of-powers doctrine as it constitutes an effort by Congress to adjudicate a question which is judicial in nature. Therefore, the presumption of Section 4 (b) being itself unconstitutional, it adds nothing to the act, and leaves it exposed as a patent effort by Congress to establish qualifications for electors contrary to those prescribed by state law, and hence unconstitutional.

2. Section 5, in Undertaking to Vest in the District Courts for the District of Columbia a Veto Power Over the Legislation of Certain States, Is Unconstitutional as

an Effort to Confer Non-judicial Powers on the Federal Courts. The Section also cannot be sustained under the "local function" powers of the court for the District, as the power in question has no connection with local affairs in the District.

3. The Act Is Unconstitutional as a Bill of Attainder, in Violation of Article I, Section 9. This provision affords protection to an entire class, as well as to individuals. **Cummings v. Missouri**, 4 Wall. 277, 18 L. Ed. 356 (1867); **United States v. Lovett**, 328 U. S. 303, 90 L. Ed. 1252 (1946).

4. The Act Violates the Equality of States Required by the Constitution.

5. Section 14 (b) of the Act Is Unconstitutional. Access to the Courts is a privilege and immunity of national citizenship, **Slaughter House Cases**, 16 Wall. 36, 79, 21 L. Ed. 394, 409 (1873), and is also embraced within the concept of due process of law. **Ex Parte Hull**, 312 U. S. 546, 549, 85 L. Ed. 1034 (1941). A citizen of a State covered by the act has his vote diluted by the votes of other persons unqualified under state law just as much so as a citizen who complains that he is denied the right to vote because of his race or residence. The latter has the right to institute suit to vindicate his constitutional rights in the state of his residence, whereas, a citizen complaining of the dilution of his vote because of the inclusion of the votes of incompetent persons is required to travel to the District of Columbia to institute suit. This constitutes an illegal discrimination. Moreover, a state official against whom suit is instituted by the Attorney General is prevented from asserting as one defense the unconstitutionality of the voting rights act. This constitutes a denial of due process of law, as well as a denial of equal protection. The state has standing to assert these issues. **NAACP v. Alabama**, 357 U. S. 449, 458, 2 L. Ed. 2d 1488 (1958).

III.

ARGUMENT.

1. The Act Is Unconstitutional as Being in Violation of Article I, Section 2, and the Seventeenth Amendment.

Section 4 of the Voting Rights Act declares that no person shall be deprived of his right to vote in any federal, state, or local election because of his failure to comply with any "test or device" in any State with respect to which determinations have been made under subsection (b) thereof, or in any political subdivision with respect to which such determinations have been made as a separate unit.

The "determination" referred to, as set forth in subsection (b), is as follows:

> "(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.
>
> A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

"Tests or devices" are defined by subsection (c) as:

> ". . . any requirement that a person as a prerequisite for voting or registration for voting (1) demon-

strate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

It is the contention here that these provisions violate Article I, Section 2, of the Constitution of the United States, and the Seventeenth Amendment, which confer upon the states the power to prescribe voter qualifications. The argument supporting this contention may be broken down into five basic parts: (a) Article I, Section 2 and the Seventeenth Amendment vest in the states the exclusive power to prescribe voter qualifications, subject only to exceptions not applicable; (b) The power of the states over voter qualifications has not been abrogated by any amendment to the Constitution; (c) The Act is not "Appropriate Legislation" to enforce the Fourteenth and Fifteenth Amendments; (d) Literacy and other like tests constitute legitimate voter qualifications and do not violate the Fifteenth Amendment's ban upon racial discrimination in voting; (e) The presumption of State discrimination in voting prescribed by Section 4 (b) of the Act, being arbitrary and unreasonable, does not save the Act, and leaves it exposed as a patently unconstitutional attempt by Congress to displace state qualifications for voting. These five points will be discussed in the order stated.

(a) Under Article I, Section 2, and the Seventeenth Amendment, the Power to Prescribe Voter Qualifications Is Lodged Exclusively in the States, Subject Only to Stated Exceptions.

The Constitution, Art. I, Sec. 2, Cl. 1, provides:

"The House of Representatives shall be composed of members chosen every second year by the People

of the several States, **and the electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.**"

Art. I, Sec. 4, Cl. 1, provides:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

Art. II, Sec. 1, as amended by Amendment 12, provides for election of the President and Vice President by a "number of electors equal to the whole number of Senators and Representatives to which the State may be entitled . . .", and it is provided that these electors shall be appointed by "each State" **in such manner as the Legislature thereof may direct".**

The Fourteenth Amendment, Sec. 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 provides that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

The Fifteenth Amendment declares:

> "Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

The Seventeenth Amendment, insofar as relevant, provides:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Every inquiry involving an assertion of federal power by Congress must begin with a recurrence to certain fundamental propositions concerning the federal system.

Ours is a dual or federal system, wherein the members of the organized society possess dual citizenship. Consequently, the individual acquires certain rights by virtue of his national citizenship, and other rights by virtue of his state citizenship. **United States v. Cruikshank**, 92 U. S. 542, 23 L. Ed. 588 (1876).

In ascertaining whether any particular right springs from federal or state sources, it is a cardinal rule, ably expressed by this Court in **United States v. Harris**, 106 U. S. 629, 27 L. Ed. 290, 292 (1883),

". . . that the Government of the United States is one of delegated, limited and enumerated power. (Martin v. Hunter, 1 Wheat., 304; McCullock v. Maryland, 4 Wheat., 316; Gibbons v. Ogden, 9 Wheat.; 1. Therefore, every valid Act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution; section 1, of the first article, declares that all legislative powers granted

by the Constitution shall be vested in the Congress of the United States. Section 8, of the same article, enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'To make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof'. Article X, of the Amendments to the Constitution, declares that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'."

"Mr. Justice Story, in his Commentaries on the Constitution, says:

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it not be expressed, the next inquiry must be, whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, then it may not exercise it."

Applying these principles to the present question, what do we find?

In the plainest language possible, Art. I, Sec. 2, declares that electors for members of the House of Representatives "shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature".

When the method of selecting Senators was changed from election by the State Legislatures to election by the people in the Seventeenth Amendment, Section 1 thereof adopted language identical to Art. I, for it was provided:

"The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." This amendment was adopted subsequent to the Fifteenth, and in case of conflict, controls.

The effect of this language is clearly stated in Willoughby, **The Constitutional Law of the United States**, pp. 540-541:

> "A distinction is to be made between the right to vote for a representative to Congress and the conditions upon which that right is granted . . . the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each state to vote for the members of the most numerous branch of the State legislature. **The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several State legislatures** . . ." (emphasis supplied).

Similarly, in Mathews, **The American Constitutional System**, 2nd Ed., p. 363 (1940), it is said:

> "Two provisions of the Constitution other than section 2 of Art. I and the Seventeenth Amendment indirectly leave to the States powers over voting qualifications. The first is Sec. 1 of Art. II which grants to the States the right to choose the manner of appointing Presidential electors. If elections are designated as the manner of appointing electors, the States have authority to determine what shall be the qualifications of voters in these elections. The second provision is the second section of the Four-

teenth Amendment. 'This section of the amendment clearly recognizes the right of a State to adopt suffrage qualifications which exclude certain of its adult male citizens from voting.' By this section the State is penalized for denying the right to vote to male citizens of twenty-one years of age for reasons other than participation in rebellion or other crime; but the right to deny the suffrage, meaning ordinarily the right to establish qualifications restricting the right to vote, is legally sanctioned."

In **Minor v. Happersett,** 21 Wall. 162, 22 L. Ed. 627, 629 (1875), decided prior to adoption of the Nineteenth Amendment, it was said, in upholding a Missouri statute denying the right of suffrage to women:

"The Constitution does not define the privileges and immunities of citizens. For that case we need not determine what they are, but only whether suffrage is necessarily one of them.

"It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State Legislature. Const., art. 1 and 2. Senators are to be chosen by the Legislatures of the States and necessarily the members of the Legislature required to make the choice are elected by the voters of the state. Const., art. 1, and 3. Each State must appoint in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. Const., art. 2, and 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each

state by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. Const., art. 1, and 4."

The rationale behind this choice of language can be determined from an examination of contemporary authorities.

In the debates which took place in the constitutional conventions held in the original States for the purpose of ratifying the Constitution, it was pointed out that since elections for Congressmen would likely be held at the same time and as a part of elections for state officers, a hard and disagreeable situation would arise; an elector could vote for state officers, but would be held ineligible to vote for congressman—a situation which would possibly arise had the Constitution sought to prescribe uniform qualifications or to authorize Congress to do so. **5 Elliot's Debates, p. 385.**

Mr. Nichols of Virginia had this to say concerning Art. I, Sec. 2, to wit:

"I will consider it first, then, as to the qualifications of the electors. The best writers on government agree that, in a republic, those laws which fix the right of suffrage are fundamental. If, therefore, by the proposed plan, it is left uncertain in whom the right of suffrage is to rest, or if it has placed that right in improper hands, I shall admit that it is a radical defect; but in this plan there is a fixed rule for determining the qualifications of electors, and that rule the most judicious that could possibly have been devised, because it refers to a criterion which cannot be changed. A qualification that gives a right to elect representatives for the state legislatures, gives also, by this Constitution, a right to choose representatives for the general government. As the

qualifications of electors are different in the different states, no particular qualifications, uniform through the states, would have been politic, as it would have caused a great inequality in the electors, resulting from the situation and circumstances of the respective states. Uniformity of qualifications would greatly affect the yeomanry in the states, as it would either exclude from this inherent right some who are entitled to it by the laws of some states at present, or be extended so universally as to defeat the admirable end of the institution of representation." **3 Elliot's Debates, p. 8.**

Similarly, in **The Federalist,** No. 52, it was said:

"The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because, being fixed by the State constitu-

tions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution."

Beyond question, Hamilton considered that Art. I, Sec. 4, conferred no authority on Congress to prescribe qualifications of electors. In **The Federalist**, No. 60, in combatting the argument that Congress might exercise its power under this provision so as to secure the franchise only to the rich by discriminate selection of places in which to hold elections, Hamilton replied:

"The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the 'times', the 'places', the 'manner' of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

Another reason behind Art. I, Sec. 2, was said to be the desire to achieve a mixed representation, which could not be obtained had uniform qualifications for electors been prescribed by the Constitution. In this regard, **1 Story on the Constitution**, 4th Ed., Secs. 585, 586, p. 420, says:

"Without, therefore, asserting that such a mixed representation is absolutely and under all circumstances the best, it might be safely affirmed that the existence of various elements in a composition of the representative body is not necessarily inex-

pedient, unjust, or insecure, and, in many cases, may promote a wholesome restraint upon partial plans of legislation, and insure a vigorous growth to the general interest of the Union. The planter, the farmer, the mechanic, the merchant, and the manufacturer might thus be brought to act together, in a body representing each; and thus superior intelligence, as well as mutual good-will and respect, be diffused through the whole of the collective body."

Some confusion on the question may arise from statements in numerous decisions concerning whether the right of suffrage with respect to members of Congress is derived from state or federal sources.

For example, in **Minor v. Happersett,** 21 Wall. 162, 22 L. Ed. 627 (1875), it was said that the right of suffrage was not a privilege and immunity of national citizenship (p. 171), and "the Constitution of the United States does not confer the right of suffrage upon anyone" (p. 178).

Similar statements were made in **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588, 592 (1876); **Mason v. Missouri ex rel. McCoffery,** 179 U. S. 328, 335, 45 L. Ed. 214 (1900); **McPherson v. Blacker,** 146 U. S. 1, 37, 36 L. Ed. 869 (1892); **Breedlove v. Suttles,** 302 U. S. 277, 283, 82 L. Ed. 252 (1937).

On the other hand, apparently contradictory statements may be found in such cases as **Wiley v. Sinkler,** 179 U. S. 58, 62, 45 L. Ed. 84 (1900); **Swafford v. Templeton,** 185 U. S. 487, 46 L. Ed. 1005 (1902); and **U. S. v. Mosley,** 238 U. S. 383, 59 L. Ed. 1355 (1915).

In the Wiley Case, the Court declared:

"The right to vote for members of the Congress of the United States is not derived merely from the Constitution and Laws of the state in which they are

chosen, but has its foundation in the Constitution of the United States."

Actually, the cases are not in conflict. They must each be read in the context of their particular facts. The cases were all harmonized in **Ex Parte Yarbrough,** 110 U. S. 661, 28 L. Ed. 274 (1884), which was a petition for habeas corpus attacking convictions under Sections 5508 (similar to 42 U. S. C. A. 1985) and 5520 (now 18 U. S. C. A. 594) of the Revised Statutes, the indictment alleging that defendants assaulted and beat a Negro citizen for having exercised his right to vote in an election for representative to Congress. The Court upheld these statutes as applied to persons interfering with electors voting for federal officials, as against the argument that since, as it was claimed, the right to vote was derived from the states, Congress could not protect it. In rejecting this contention, it was said:

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

"The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely: by election.

"Its language is: 'The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the same qualifications requisite for electors of the most numerous branch of the State Legislature.' **Article I, Section 2.** The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine.* They define who are to vote for the popular branch of

their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualifications of its own electors for members of Congress.

"It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

"Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of **Minor v. Happersett,** 21 Wall. 178 (88 U. S., XXII, 631), that 'the Constitution of the United States does not confer the right of suffrage upon anyone', without reference to the connection in which it is used, insists that the voters in this case do not owe their rights to vote in any sense to that instrument.

"But the Court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men."

"In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the Court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors."

In other words, the right to vote for a candidate for Congress is derived from federal sources in the sense

that the federal Constitution creates the office, provides for election by the people, and authorizes Congress in Art. I, Sec. 4, to alter the "times, places and manner of holding elections for Senators and Representatives." On the other hand, the right is a state right in the sense that the Constitution itself, in Art. I, Sec. 2, and the Seventeenth Amendment, has referred the question of qualifications for electors to state law.

In the **Yarbrough Case**, the Court expressly recognized that "the importance to the General Government of having the actual election, the voting for those members, free from force and fraud **is not diminished by the circumstance that the qualifications of the voter is determined by the law of the State where he votes**" (p. 663). Art. I, Sec. 2, expressly declares that electors for Congress shall have the same qualifications as electors for members of the most numerous house of the State Legislature (p. 663).

Substantially the same explanation was given in **United States v. Classic**, 313 U. S. 299, 85 L. Ed. 1368 (1941), where indictments were returned against Louisiana election officials for having altered and falsely counted votes cast in a primary election for nomination of candidates for Congress. The prosecution was brought under what is now 18 U. S. C. A., Secs. 241 and 242.

Observing that Louisiana statutes incorporated primaries as an integral part of its election process, the Court held the statutes applicable to the Louisiana primary, in effect disapproving a contrary holding in the Newberry case.

It was said:

> "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the

Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

* * * * * * *

"While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the States (see Minor v. Happersett, 21 Wall. (U. S.) 162, 170, 22 L. Ed. 627, 629; United States v. Reese, 92 U. S. 214, 217, 218, 23 L. Ed. 563-565; McPherson v. Blacker, 146 U. S. 1, 38, 39, 36 L. Ed. 869, 878, 879, 13 S. Ct. 3; Broadlove v. Suttles, 302 U. S. 277, 283, 82 L. Ed. 252, 256, 58 S. Ct. 205); this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Sec. 2 of Art. 1, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Sec. 4 and its more general power under Art 1, Sec. 8, clause 18, of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers'."

"And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states."

At page 317, however, it was clearly stated that this authority was derived from Art. 1, Sec. 4, and see page 310, holding that the right to vote for members of Congress is defined in Art. I, Sec. 2, declaring that Representatives are to be chosen by the people, etc., subject to regulations prescribed by Sec. 4.

However, the question as to qualifications for electors is not seriously disputed today.

In **Venice v. Ryder**, 176 F. Supp. 30, 34 (D. C. La. 1959), the Court held:

> "Under our constitutional system, the qualifications of voters is a matter committed to the States, subject only to federal constitutional restrictions prohibiting discrimination on account of race, color, sex. . . ."
>
> * * * * * * *
>
> "The question of whether or not a voter is a qualified elector is a State matter to be determined by state law and state courts" (p. 37).

In **Tullier v. Giordano**, 265 F. 2d 5 (C. A. 5th, 1959), an injunction was sought against a Louisiana registrar, the charge being that he refused to register, by reason of the literacy test imposed by state law, all voters not friendly to his political faction. The Court declared:

> "Under our federal system the qualification of voters is left to the several States subject to constitutional limitations imposed by the United States Constitution. As originally adopted, the constitution contained few provisions on the subject of voting rights."

The Court then referred to Art. I, Secs. 2 and 4; Art. II, Sec. 1, and the Twelfth, Fourteenth, Fifteenth, Seventeenth, and Nineteenth Amendments.

In **Darby v. Daniel**, 168 F. Supp. 170 (D. C. Miss. 1958), a upholding the Mississippi literacy test, it was said:

> "Any consideration of the constitutionality of the challenged portions of the Amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States" (p. 172).

See also **Fields v. Brown**, 159 F. 2d 210 (C. A. 6th, 1951), Cert. den. 334 U. S. 852.

The question as to presidential electors was settled in **McPherson v. Blacker**, 146 U. S. 1, 36 L. Ed. 869 (1892), which involved mandamus by nominees for Presidential elector against the Michigan Secretary of State, seeking to have declared unconstitutional a recent Michigan statute governing election of presidential electors. The new statute provided for the election by districts of presidential and vice-presidential electors, and plaintiffs contended that the Constitution required the state to act as a unit, and not delegate to subdivisions the right to select electors.

The Court rejected this attack, holding that "the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States", referring to Art. II, Sec. 1, Cl. 2 (p. 35).

No violation of the 14th or 15th Amendments was found, as the right of suffrage was held to be derived from state citizenship (pp. 37-8).

Cooley on **Constitutional Limitations**, Vol. II, pages 1360-1, declares:

> "The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national Constitution to the several States, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature, and as the Fifteenth Amendment forbids denying of citizens the right to vote on account of race, color, or previous condition of servitude."

It is also interesting to note that when the Constitution was being drafted, the Committee on Detail originally proposed giving Congress the power to fix the qualifications of electors in the following language:

"The qualifications of electors shall be the same (throughout the states, viz.) with that in the particular states unless the legislature shall hereafter direct some uniform qualifications to prevail through the states:

(Citizenship
manhood
sanity of mind
previous residence for one
year; or possession of real
property within the state
for the whole of one year,
or inrolment in the militia,
for the whole of a years)."

See Farrand, The Records of the Federal Convention, Vol. 2, pp. 139-140.

However, this provision was later deleted. See Vol. 2, pp. 155, 613.

In Curtis, **History of the Constitution of the United States**, Vol. 2, pp. 194-200, it is said that the Committee on Detail evolved Art. I, Sec. 2, so as to avoid the situation whereby an elector in one state could vote for highest state officers but not for members of Congress, viz.:

"Another difficulty which attended the adjustment of the right of suffrage grew out of the widely differing qualifications annexed to that right under the State constitutions, and the consequent dissatisfaction that must follow any effort to establish distinct or special qualifications under the national Constitution. In some of the States, the right of voting was confined to 'freeholders'; in others—and by far the greater number—it was extended beyond the holders of landed property, and included many other classes of the adult male population; while in a few,

it embraced every male citizen of full age who was raised at all above the level of the pauper by the smallest evidence of contribution to the public burdens. The consequence, therefore, of adopting any separate system of qualifications for the right of voting under the Constitution of the United States would have been that, in some of the States, there would be persons capable of voting for the highest State officers, and yet not permitted to vote for any officer of the United States; and that in the other States persons not admitted to the exercise of the right under the State constitution might have enjoyed it in national elections."

* * * * * * *

"The Committee of Detail, after a review of all these considerations, presented a scheme that was well adapted to meet the difficulties of the case. They proposed that the same persons who, by the laws of the several States, were admitted to vote for members of the most numerous branch of their own legislatures, should have the right to vote for the representatives in Congress. The adoption of this principle avoided the necessity of disfranchising any portion of the people of a State by a system of qualifications unknown to their laws. As the States were the best judges of the circumstances and temper of their own people, it was certainly best to conciliate them to the support of the new Constitution by this concession" (p. 200).

In **Baker v. Carr**, 369 U. S. 186, 243, 7 L. Ed. 2d 663 (1962), the Tennessee Reapportionment case, Mr. Justice Douglas stated in a concurring opinion:

"That the States may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that the House of Representatives shall be chosen by the people and that the Electors

(voters) in each state shall have the qualifications requisite for electors (voters) of the most numerous branch of the State legislature. The same provision, contained in the Seventeenth Amendment, governs the election of Senators."

In **Gray v. Sanders**, 372 U. S. 368, 9 L. Ed. 2d 821, 829 (1963), which is the Georgia County Unit case, the majority opinion declares:

"States can within limits specify the qualifications of voters both in state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. 1, Sec. 2. As we held in Lassiter v. Northampton County Election Board, 360 U. S. 45 . . ., a state may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group."

The case of **State of Alabama v. Rogers**, 187 F. Supp. 848, 854 (D. C. Ala. 1960), was an Action by the Attorney General under the 1960 Civil Rights Act to compel production of voting records. The State filed cross complaint, attacking the constitutionality of the Act. The Court stated:

"Although the particular qualifications one must possess to exercise this right to vote are left to the states—as long as that exercise is within the constitutional framework—the power to protect voters who are qualified is confided to the Congress of the United States."

In **United States v. Fox**, 211 F. Supp. 25, 30 (D. C. La. 1962), Louisiana had, in 1962, amended its laws so as to dispense with the provisions requiring an applicant to interpret provisions of the constitution, in favor of a law whereby 6 questions with 3 optional answers on each card,

for the applicant to circle the correct answer, are submitted to each applicant. To pass, he must answer 4 questions correctly. There are 10 such cards or sets of questions from which the applicant draws one, face down. Suit was instituted against the registrars of Plaquemines Parish, Louisiana, alleging discrimination in registration of Negroes. At the outset, the Court declared:

> "The law is clear that 'The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised absent of course the discrimination which the Constitution . . .'
>
> * * * * * * * *
>
> In Guinn v. United States, 238 U. S. 347, the Supreme Court upheld the right of the states to apply a literacy test to all voters irrespective of race and color, saying, 'No time need be spent on the question of the validity of the literacy test considered alone as we have seen its establishment was but the exercise by the State of a lawful power vested in it, not subject to our supervision, and indeed, its validity is admitted.' "

See also **United States v. Penton**, 212 F. Supp. 193, 201 (D. C. Ala. 1962).

In **Carrington** v. **Rash**, 380 U. S. 89, 13 L. Ed. 2d 675 (1965), a provision of the Texas Constitution was challenged which prohibited any person from voting in Texas who moved his home there during the course of military duty for so long as he remained in the service. While the statute was held unconstitutional under the Fourteenth Amendment, it was held:

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed,

'the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' **Lassiter v. Northampton Election Bd.**, 360 U. S. 45, 50. Compare **United States v. Classic**, 313 U. S. 299; **Ex parte Yarbrough**, 110 U. S. 651. 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' **Pope v. Williams**, *supra*, at 632."

(b) **The Power of the States to Prescribe Qualifications Has Not Been Abrogated by Any Amendment to the Constitution.**

The Fourteenth Amendment prohibits any state from denying equal protection. The Fifteenth prohibits a state from abridging the right to vote because of "race, color, or previous condition of servitude."

The Seventeenth Amendment provides for election of Senators by the people, but in Section 1 expressly adopts as qualifications for electors, the qualifications prescribed by state law for electors of the most numerous branch of the State Legislatures.

The Nineteenth Amendment declares that the right to vote shall not be denied or abridged by the United States or any State on account of sex.

These amendments do not confer the right to vote on anyone. They are negative in character only, and merely declare that certain things can **not** be considered in defining the right to vote.

In **Newberry v. United States**, 256 U. S. 232, 248, 65 L. Ed. 913 (1921), this Court held that prior to the Sev-

enteenth Amendment, Art. I, Sec. 4, defined the sole authority of Congress over elections for Congress and the Senate. It was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' "

Insofar as the **Newberry Case** held federal law inapplicable to primaries, it undoubtedly has been superseded by **United States v. Classic**, 313 U. S. 299, 85 L. Ed. 1368 (1941), but the principle just enunciated was not affected, the decision in the Classic Case having been predicated upon the fact that state law had there made the primary an integral part of the state election machinery, and in practice, it had become the only meaningful election.

In **Minor v. Happersett**, supra, decided after adoption of the Fourteenth Amendment, an attack on Missouri statutes denying women the right to vote was upheld as against the claim that such law was in violation of the Amendment, the Court declaring that the right of suffrage is not a privilege and immunity of national citizenship (p. 171), and it was further said:

> ". . . the Constitution of the United States does not confer the right of suffrage upon anyone" (p. 178).

In **Ex Parte Yarbrough**, supra, decided in 1884, the Court recognized that the matter of qualifications of voters was still left to the states (110 U. S. at 663).

In **U. S. v. Munford**, 16 F. 223 (C. C. Va. 1883), it was held that Congress' power under the Fifteenth Amend-

ment was limited to matters involving racial discrimination.

In **Lackey v. United States**, 107 F. 114, cert. den. 181 U. S. 621, Section 5507 of the Revised Statutes, derived from the Enforcement Act of 1870, was declared unconstitutional. This statute sought to make unlawful the bribing of voters in a purely state election, without any requirement that such action be based on race or previous condition of servitude. The Court noted that Congress' power under the Fifteenth Amendment was limited to state action. It was said that the Amendment confers no right to vote on anyone, but merely forbids discrimination by the State based upon race (p. 118). Moreover, the Amendment does not protect the Negro against any obstruction of his right to vote, **unless such obstruction was because of his race.**

Similarly, in **United States v. Cruikshank**, 92 U. S. [illegible], 23 L. Ed. 588, 592 (1876), it was held:

> "In Minor v. Happersett, 21 Wall. 178 (88 U. S., XXII, 631), we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In U. S. v. Reese just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination

comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876), an indictment was brought under Sec. 4 of the Enforcement Act of 1870 (16 Stat. 140) against Kentucky election officials for refusing to receive and count the vote of a Negro in an election for municipal officials, Sec. 4 providing for the punishment of anyone who by force, bribery, threats, etc., hinders, delays, or obstructs a citizen from doing any act required to be done in order to qualify him to vote. Upon argument, the Government abandoned consideration of all claims not dependent upon the Fifteenth Amendment. Noting that the Fifteenth Amendment does not confer the right of suffrage on anyone (p. 594), the Court concluded that Sec. 4 was not limited to the authority of the 15th Amendment, i. e., obstructions based upon race, color, etc., but purported to apply to any obstruction. So being, Sec. 4 was held unconstitutional, and the Court found itself unable to limit it to deprivations based on race, as its terms did not admit of separability, and any attempt to so do would render it so vague as to leave the accused uncertain of its scope.

In **Guinn v. United States,** 238 U. S. 347, 362, 59 L. Ed. 1340 (1915), the Oklahoma "Grandfather Clause" was declared unconstitutional, which in effect imposed a literacy test against Negro voters, but exempted White voters. The Court was clear to point out, however, that neither the Fourteenth nor Fifteenth Amendments had affected the power of the states to prescribe qualifications not dependent upon race. It was said:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those

governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

"Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both."

The effect of the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments is well stated in an article entitled "Voting Rights", 3 Race Rel. L. R. 371, 372 (1958), viz.:

"**The effect of these constitutional provisions, however, is not to confer on any person a federal right to vote. The state, not the federal government, is still primarily responsible for voting rights; but once the state purports to give any person or class the elective franchise, the federal constitutional and statutory provisions immediately and automatically operate to limit the power of the state to determine whether it will withhold the franchise from any person or group of persons.** Thus, upon the adoption of the Nineteenth Amendment, all state constitutional and statutory provisions withholding the elective franchise from women solely because of their sex were immediately null and void. See People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N. E. 145 (1931); Annot., 71 A. L. R. 1332 (1931). **It would**

> **seem, therefore, that the states are free to establish any requirement they may deem wise, as long as these requirements are not discriminatory nor based on sex, race, color or previous condition of servitude.** As a consequence, voting rights may, and often do, vary widely from state to state."

Anticipating the argument that Congress derives power for the present legislation from Art. I, Sec. 4, Cl. 1, relating to Congress' power to make regulations relative to the "times, places and manner of holding elections for Senators and Representatives", some discussion relative to that clause is deemed appropriate.

It would be enough to say that since Art. 1, Sec. 2, makes express reference to qualifications of electors by adopting those applicable to state legislatures, and since the Seventeenth Amendment makes similar provision as to Senators, these specific provisions will necessarily control over the more general language of Art. I, Sec. 4, even assuming the latter to be otherwise applicable, which as will be hereafter shown, it definitely is not. See **50 Am. Jur. 371**, Sec. 367, setting forth the rule that specific provisions of a document control as against more general ones, which, without the specific, would be included in the general.

Certainly, the reference to "time" and "place" in Art. I, Sec. 4, has no relevance here.

With respect to "manner", this word generally has reference to the procedure or the way of doing a thing, and does not define who is qualified to do it. In re **Koelhoffer's Estate**, 25 A. 2d 638, 644, 20 N. J. Misc. 139; **State v. Adams**, 2 Stew. 231, 242 (Ala.).

People v. Guden, 75 N. Y. S. 347, 349 (1902), holds:

> "The 'manner of election' does not go to the question of what body of electors shall elect."

Livesley v. Litchfield, 83 P. 142, 144, 47 Or. 248, 114 Am. St. Rep. 920 (1905), held:

> "The authority given by Section 7 of Article 6 to prescribe the 'time and manner' in which municipal officers may be elected or appointed does not, we think, include the power to determine what shall constitute a legal voter."

The Court then quoted from **People v. English**, 139 Ill. 622, 29 N. E. 678 (1892), to the effect that:

> "The Constitution having thus made provision for such officer, and for his and her 'election', and having prescribed, in Sec. 1 of Art. 7 (Ill. Const.), the qualifications essential to entitle a person to vote at 'any election', it must be presumed that it was and is the true intent and meaning of the instrument that no person shall have the right to vote for a county superintendent of schools who does not possess such qualifications. * * * Said section 5 (art. 8) provides, not only that the qualifications, powers, duties, compensation, and term of office of the county superintendent of schools shall be prescribed by law, but also that the 'time and manner' of election of such superintendent 'shall be prescribed by law'. What is meant by the expression 'manner of election'? Was it intended thereby to give to the Legislature the power of prescribing the qualifications which would entitle persons to vote at any election for such county superintendent? The word 'manner' is usually defined as meaning way of performing or executing, method, custom, habitual practice, etc. * * * (It) indicates merely that the Legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election."

In **Newberry v. United States**, 256 U. S. 232, 250, 257, 65 L. Ed. 913 (1921), the Court, in speaking of Article 1,

Sec. 4, stated that "Sundry provisions of the Constitution indicated plainly enough what its framers meant by elections and the 'manner of holding' them", following which the Court enumerated a list of provisions, all of which were purely procedural in nature. Reference was made to Hamilton's statement in **The Federalist**, No. 60, to the effect that the qualifications of electors, inter alia other matters, could not be altered. In dealing specifically with the language as to "manner of holding", it was said:

> "Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these."

In **Smiley v. Holm**, 285 U. S. 355, 76 L. Ed. 795 (1932), the Court specified some of the things which properly might be included within the term "manner", to wit:

> "The subject matter is the 'times, places and manner of holding elections for Senators and Representatives'. It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notice, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

In the Constitutional debates, the discussion relative to Art. I, Sec. 4, centered principally around the reform

to "place and time". See 3 **Elliot's Debates**, pp. 60, 375, 386, 403-4; 5A. Vol. 2, p. 32.

Mr. Madison stated that this authority in Congress was necessary, and he gave several examples, all of which involved procedural matters. 3 **Elliot, pp. 403-404**. See also 2 Elliot, pp. 12-16; 46-49; 103; Vol. 4, p. 316.

Mr. Steele of North Carolina stated the issue very succinctly, viz.:

> "Every man who has a right to vote for a representative to our legislature will ever have a right to vote for a representative to the general government. Does it not expressly provide that the electors in each state shall have the qualifications requisite for the most numerous branch of the State Legislature? Can they, with a most manifest violation of the Constitution, alter the qualifications of the electors? The power over the manner of elections does not include that of saying who shall vote;—the Constitution expressly says that the qualifications which entitle a man to vote for a state Representative. It is, then, clearly and indubitably fixed and determined who shall be the electors; and the power over the manner only enables them to determine how those electors shall elect—whether by ballot, or by vote, or by any other way." 4 **Elliot** 75.

In a disputed election case before Congress in 1866, it was declared that the purpose of Art. I, Sec. 4, was to authorize Congress to act in case the States did not. It was pointed out that 7 of the 13 original States protested against this section, and it was finally approved with the understanding that Congress would act only where the States had failed to do so. 1 Bart. 62, Cas. 67 (1866).

Similar views were expressed by Hamilton in **The Federalist**, No. 59, where it was said:

"It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed; that it must either have been lodged wholly in the national legislature, or wholly in the State Legislature, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

"Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say, that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk."

From another standpoint, it is clear that Art. I, Sec. 4. does not support the validity of the Act, insofar as it

would illegalize literacy tests. The words: "times, places and manner" appear in that sequence. "Times" and "places" are specific in nature, and precede the more general term "manner".

Consequently, under the rule of interpretation known as *ejusdem generis*, the meaning of "manner" is restricted by "times" and "places." **50 Am. Jur. 244**, Sec. 249. As stated in **Cutler v. Kouns**, 110 U. S. 720, 728, 28 L. Ed. 305 (1884),

> "The rule of interpretation correctly stated is, that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified."

See also **United States v. Salen**, 235 U. S. 237, 59 L. Ed. 210 (1914), and **Cleveland v. United States**, 329 U. S. 14, 18, 91 L. Ed. 12 (1946).

Since "times" and "places" deal only with the physical or procedural aspects of an election, it is clear that "manner" must likewise be limited, and cannot be held to embrace such substantive matters as the qualifications of electors. To construe it otherwise would not only violate the rule of *ejusdem generis*, but likewise completely nullify so much of Art. I, Sec. 2, and Section 1 of the Seventeenth Amendment, as adopt the qualifications prescribed by state law. Even as to the original Constitution, i. e., Art. I, Sec. 2, all provisions must be construed so as to give effect to each, **50 Am. Jur. 361**, Sec. 358, and to harmonize all parts and avoid inconsistencies. **50 Am. Jur.** 367, Sec. 363. To assert otherwise here would require that we go even further and assume that Section 1 of the Seventeenth Amendment, although a later expression of the people than Art. I, Sec. 4, was nevertheless subordinate to the latter.

The extent of Congressional power is also indicated to some extent by Congressional interpretation thereof as

evidenced by statutes enacted by Congress in the past. Some of these statutes are as follows:

2 USCA 1, as amended—Time for election of Senators, and certification of results.

2 USCA 2 and 2a—Number, apportionment and reapportionment of representatives.

2 USCA 3—Election of Representatives by districts.

2 USCA 4—Representative at Large following increase due to reapportionment.

2 USCA 5—Nomination of Representative at Large.

2 USCA 6—Reduction of representation following census.

2 USCA 7—Time of Election.

2 USCA 8—Vacancies.

2 USCA 9—Voting by written, printed ballot, or voting machine.

2 USCA, Chap. 7—Contest of elections.

2 USCA, Chap. 8—Corrupt Practices Act. See U. S. v. Foote, 42 F. Supp. 717 (D. C. Del. 1942), upholding 2 USCA 250, penalizing expenditures to influence voting, the Court predicating its decision on Art. I, Sec. 4.

See also 18 USCA, Sections 591, et seq., defining penal offenses relative to elections, such as intimidation of voters (Sec. 594), and expenditures to influence voting (Sec. 597).

As pointed out in **Ex Parte Yarbrough,** 110 U. S. 661, 28 L. Ed. 274 (1884), and in **United States v. Classic,** 313 U. S. 299, 85 L. Ed. 1368 (1941), Congress can legislate so as to regulate the conduct of **Federal elections** so as to protect them against fraud, violence and the like, even as against the acts of private individuals, but as stated in the **Yarbrough Case,**

> "... the importance to the General Government of having the actual election, the voting for those mem-

bers, free from force and fraud is not diminished by the circumstance that the qualifications of the voter is determined by the law of the state where he votes" (p. 663).

In the **Classic Case**, in speaking of Congress' authority under Art. I, Sec. 4, it was said:

"And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states."

At page 317, however, it was clearly stated that this authority was derived from Art. I, Sec. 4, and see page 310, holding that the right to vote for members of Congress is defined in Art. I, Sec. 2, declaring that Representatives are to be chosen by the people, etc., subject to regulations prescribed by Sec. 4.

At page 320, it was said:

"Not only does Sec. 4 of Art. I authorize Congress to regulate the manner of holding elections, but by Art. I, Sec. 8, clause 18, Congress is given authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. 'Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end which are not prohibited but consistent with the latter and spirit of the Constitution, are constitutional.' "

But in this respect, it is clear that this Court was referring to the process of the election itself, in the sense

that unless Congress could regulate primaries, state law could in effect completely destroy Congress' power under Art. I, Sec. 4, by incorporating primaries into its election machinery to such an extent, as was done there, as to make the primary the real election and the general election only a formality. The Court obviously was not concerned with the substantive qualifications of electors.

In Christensen, "The Constitutionality of National Anti-Poll Tax Bills," 33 Minn. L. R. 217 (1949), the author declares that the states prescribe qualifications subject only to the Fifteenth and Nineteenth Amendments, dealing with race and sex. He discusses the **Classic Case** and concludes that at pages 307, 310, 314, the Court was saying that it is only the right of **qualified** voters (under state law) that is a national right.

Other cases have recognized Congress' power as to federal elections in similar terms. See **Ex Parte Siebold,** 100 U. S. 383, 25 L. Ed. 717 (1880); **U. S. v. Gale,** 109 U. S. 1, 27 L. Ed. 857 (1883); **United States v. Munford,** 16 F. 223 (c. c. Va. 1883); **United States v. Mosley,** 238 U. S. 383, 59 L. Ed. 1355 (1915); **United States v. Belvin,** 46 F. 381 (c. c. Va. 1891); **Larche v. Hannah,** 177 F. Supp. 816 (D. C. La. 1959), reversed, 363 U. S. 420, 4 L. Ed. 2d 1307 (1960); and cf. **Logan v. United States,** 144 U. S. 263, 36 L. Ed. 429 (1892).

On the other hand, federal legislation governing **state elections** is limited by the Fourteenth and Fifteenth Amendments to **discrimination** arising from **state action,** and Congress is powerless to legislate regarding state elections with respect either to private individuals, or interferences not concerned with race. **Lackey v. United States,** 107 F. 114, cert. den. 181 U. S. 621; **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588 (1876); **United States v. Harris,** 106 U. S. 629, 27 L. Ed. 290 (1883); **Baldwin v. Franks,** 120 U. S. 678, 30 L. Ed. 766 (1887); **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876).

Moreover, the mere fact that members of Congress are also voted on in a state election confers no power on Congress to regulate the latter. **Ex Parte Siebold,** supra (100 U. S. at 393); **Ex Parte Perkins,** 29 F. 900 (C. C. Ind. 1887).

It is also interesting to note that in the 1959 Report of the United States Civil Rights Commission, Commissioners Hannah, Hesburgh, and Johnson recommended adoption of a constitutional amendment which would outlaw use of literacy tests. See Report, p. 143; **4 Race Rel. L. R.** 791 (1959). It is significant that even such partisans who obviously favor abolition of literacy tests believe that a constitutional amendment will be required to accomplish it. Commissioners Storey and Carlton, who opposed the proposal, agreed in this respect, for they declared:

> "On principle, proposals for constitutional amendments which would alter long-standing Federal-State relationships, such as the constitutional provision that matters pertaining to the qualifications of electors shall be left to the several States, should not be proposed in the absence of clear proof that no other action will correct an existing evil. No such proof is apparent." **4 Race Rel. L. R.,** p. 793.

Directly in point is the recent decision of the three-judge district court in the District of Columbia, striking down Section 4 (e) of the Voting Rights Act, which purports to invalidate state laws requiring, as a condition of the right to vote, the ability to "read, write, understand, or interpret any matter in the English language." **Morgan v. Katzenbach,** ... F. Supp. ..., 34 L. W. 2265, decided November 15, 1965. In this case, the Court declared:

> "Whenever Congress took steps to prohibit the states from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a con-

stitutional amendment, which later was ratified by the states. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment. If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage."

Referring to this Court's decision in **Carrington v. Rash**, supra, the Court observed that a state may not, in prescribing voter qualifications, establish an unreasonable classification, but then declared:

> "This rule is inapplicable in the instant case because in Lassiter v. Northampton Election Bd., 360 U. S. 45, * * * it was held that a distinction between citizens who can read and write English and those who cannot, is not an unreasonable classification and does not violate the Equal Protection * * * Clause."

(c) The Act Is Not "Appropriate Legislation" to Enforce the Fourteenth and Fifteenth Amendments.

Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment, authorize Congress to enforce those amendments by "appropriate legislation". While the title of the Act here declares that its purpose is "To enforce the Fifteenth Amendment . . .", reference is also made in the body to the Fourteenth Amendment.

Under these amendments, Congress is limited to legislating against State action discriminatory in nature.

Civil Rights Cases, 109 U. S. 3, 13, 27 L. Ed. 835 (1883); **Lackey v. United States,** 107 F. 114 (c. c. Ky. 1901), cert. den. 181 U. S. 621; **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588, 592 (1876). In this respect it is important to recall that Congress' power under the Fourteenth and Fifteenth Amendments is in a sense more restricted than its power to legislate as to the "manner" of federal elections under Art. I, Sec. 4. Under the latter, if the subject matter is legitimately concerned with the "manner" or conduct of the election process itself, Congress can legislate even as against private individuals, **United States v. Classic,** 313 U. S. 299, 315, 85 L. Ed. 1368 (1941), and such legislation is not limited to proscribing discrimination. **United States v. Munford,** 16 F. 223 (c. c. Va. 1883); **United States v. Foote,** 42 F. Supp. 717 (D. C. Del. 1942). Under the Fourteenth Amendment, however, Congress can legislate only so as to prevent discrimination, and under the Fifteenth Amendment, only as against discrimination based upon race or previous condition of servitude. **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876).

Applying these principles, it necessarily follows that any effort by Congress to outlaw literacy tests can not be predicated upon either of these two amendments. Literacy tests uniformly have been upheld as against claims that they constituted discrimination. **Williams v. Mississippi,** 170 U. S. 213, 42 L. Ed. 1012 (1898). **Trudeau v. Barnes,** 65 F. 2d 563 (C. C. 5th, 1933); **Darby v. Daniel,** 168 F. Supp. 170 (D. C. Miss. 1958); **Williams v. McCulley,** 128 F. Supp. 897 (D. C. La. 1955); **Lassiter v. Northampton County Board of Elections,** 360 U. S. 45, 3 L. Ed. 2d 1072 (1959). These cases are discussed at length in Part (d), infra.

Therefore, since literacy tests do not constitute discrimination, they can not be reached under either the Fourteenth or Fifteenth Amendments.

Moreover, the proposition goes even further here. To uphold the Act in this regard would require a holding that the **general** reference in these two amendments is sufficient authority for Congress to supersede the **specific** language of Art. I, Sec. 2, remitting all questions of qualifications to state law, and that such authority is also paramount to similar, specific language adopted subsequent thereto in the Seventeenth Amendment. In other words, the Government necessarily must contend that despite the rule that the latest expression of the law-making body controls, the plain language of the Seventeenth Amendment can not be given effect because of the enforcement clauses of the earlier Fourteenth and Fifteenth Amendments.

While Congress has a wide choice in selecting means to implement its powers, **United States v. Classic**, 313 U. S. 299, 320, 85 L. Ed. 1368 (1941), the means sought to accomplish even a legitimate end must not be unreasonably broad, and may in no event themselves be violative of the Constitution. **Shelton v. Tucker**, 364 U. S. 479, 5 L. Ed. 2d 231 (1961); **Smith v. California**, 361 U. S. 147, 4 L. Ed. 2d 205 (1959); **Speiser v. Randall**, 357 U. S. 513, 2 L. Ed. 2d 1460 (1958); **Apetheker v. Secretary of State**, 378 U. S. 500, 508, 12 L. Ed. 2d 992 (1964). As an example, in the Shelton case, Arkansas had enacted a law requiring public school teachers to list annually all organizations to which they had belonged or contributed within the preceding five years. In striking down this statute the Court recognized that a state has a legitimate interest in the fitness of its school teachers, and it was further recognized that the associational relationships of the teachers would have some bearing on this question. However, considering the adverse consequences likely to flow from disclosure of membership in certain organizations which the Court considered legitimate, i. e., the N. A. A. C. P., the Court held that the means selected

by Arkansas were too broad to accomplish the legitimate end, which the Court said could be more narrowly achieved. It was said that,

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

The less "drastic" alternative to outlawing literacy tests altogether is simply what is now being done, and that is to seek Court relief against discriminatory administration of such tests, as was done in such cases as **United States v. Alabama,** 192 F. Supp. 677 (D. C. Ala. 1961), and **Sellers v. Wilson,** 123 F. Supp. 917 (D. C. Ala. 1954).

Nor is it any answer to say that the proof is difficult in such cases. This argument, if valid, could be used to justify legislation authorizing imprisonment without trial.

The whole problem simply gets back to the proposition that the Constitution adopts the qualifications of electors prescribed by state law. Legislation which would in effect abrogate the Constitution in this respect can hardly be called "appropriate" for any purpose.

The legislative history of the Fifteenth Amendment also supports the view that it was not intended to authorize federal control of literacy and intelligence qualifications of voters.

The provision which later became the Fifteenth Amendment was proposed by the 3rd Session of the Fortieth Congress in 1869, and was declared, in a proclamation of the Secretary of the State, dated March 30, 1870, to have been ratified by the legislatures of 29 of the 37 states. It is interesting to note that during the debates in Congress, a measure was decisively defeated in the House which would have outlawed educational qualifications. See HR

402, 40th Cong., 3rd Sess., by Mr. Boutwell of Massachusetts, rejected by a vote of 45 to 95 (H. J. p. 231; Cong. Globe, pp. 726-728). A similar proposal by Senator Wilson of Massachusetts was defeated in the Senate by a vote of 19 to 24. Subsequently, the Senate accepted a modified version of Mr. Wilson's "educational" Amendment, but it was rejected by the House, 37 to 133, primarily because of the educational feature. Subsequently, conference committees adopted the language which later became the Fifteenth Amendment, and which makes no reference to educational or literacy matters. See Annual Report of the American Historical Association, 1896, House Documents, Vol. 74, No. 2, pp. 233-235 (54th Cong., 2nd Sess.).

Judicial Construction of Section 2 of Fifteenth Amendment.

In **Karem v. United States,** 121 Fed. 250, 258 (C. C. 6th, 1903), it was held:

> "Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color, or condition. The act commonly known as the 'Enforcement Act' (being the act of May 31, 1870; 16 Stat. 140) contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth, and fifth. The first has been carried into the Revised Statutes as section 2004 (U. S. Comp. St. 1901, p. 1272). The Third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 (U. S. Comp. St. 1901, p. 3712) of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been

in excess of the jurisdiction of the Congress under the fifteenth amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and all were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; Lackey v. United States, 46 C. C. A. 189, 107 Fed. 114, 53 L. R. A. 660."

In this case, the Court held that 5508 of the Revised Statutes was not "appropriate legislation" for the enforcement of the Fifteenth Amendment. Section 5508 declared it a crime for any two or more persons to "conspire to injure, oppress, etc., any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . .". The Court reasoned that since 5508 was not limited to state action it could not be sustained under the Fifteenth Amendment. In other words, Section 2 of the Fifteenth Amendment is a grant of power no broader than the subject matter dealt with in Section 1, and does not afford any substantive power itself.

In **McKay v. Campbell**, 2 Abb. 120, 16 Fed. Cas. No. 8,839 (D. C. Oregon 1870), it was held:

"Notwithstanding the (Fifteenth) amendment any state may deny the right of suffrage to citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several

states where they reside, without distinction of race, color, or previous condition of servitude."

In **United States v. Reese**, 92 U. S. 214, 23 L. Ed. 563 (1876), demurrer was interposed to an indictment under the Civil Rights Act of 1870 (16 Stat. 140) against Kentucky election officials for refusing to receive the vote of a Negro. Section 1 of the Act merely declared the right of all persons to vote without regard to their race, and did not itself prescribe any penalty or remedy. Remedy was prescribed by the 3rd and 4th sections of the bill, the former declaring that the offer of a person seeking to vote to perform any prerequisite under state law should be deemed compliance therewith where complete performance was frustrated by an officer or person, who would thereby be subject to stated penalties. Section 4 prescribed punishment for any person who, by force, bribery, threats, etc., prevented or obstructed any citizen from doing any act required to be done to qualify him to vote. The Government relied entirely upon the Fifteenth Amendment to sustain this legislation, and its question, as stated by the Court, was,

> ". . . whether the act now under consideration is appropriate legislation . . ." (23 L. Ed. at p. 564).

Observing that the power of Congress to legislate at all upon the subject of state elections is derived entirely from the Fifteenth Amendment (23 L. Ed. at 563), the Court held that the Act was unconstitutional because it did not purport to be limited to denials based upon race or previous condition of servitude, as was the Fifteenth Amendment from which it was derived. The Court further held that the act was not severable so as to be held applicable only to deprivations based upon race. The Court concluded,

> "We must therefore, decide that Congress has not as yet provided by 'appropriate legislation' for its

offense charged in the indictment" (20 L. Ed. at p. 566).

Even again, Section 2 is held to be limited by Section 1.

In **United States v. Sullivan**, 177 F. Supp. 855, 856 (D. C. La. 1959), Judge Skelly Wright declared:

"To be appropriate under the Fifteenth Amendment, legislation must be directed against persons acting under color of law, state or federal, and it must relate to the denial, by such person, of citizens' right to vote because of race. Any congressional action which does not contain these two elements cannot be supported by the Fifteenth Amendment."

So in the Voting Rights Act, Congress seeks to enact legislation not so limited, by suspending state voter qualifications absent any showing of discrimination.

In **United States v. Miller**, 317 Fed. 751, 754 (D. C. Ind. 1901), in speaking of the second section of the Fifteenth Amendment, it was held:

"It is manifest that no power is conferred on Congress by the second section to enact legislation for the regulation and control of elections generally, nor for securing to the citizens of the United States the right to vote at all elections. The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right, like the right to life, liberty, and the pursuit of happiness. Unless restrained by constitutional limitation, the legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others. Before the adoption of the fifteenth amendment, it was within the power of the state to exclude citizens of the United States from voting on account of race, sex, property, education, or on any other ground however arbitrary or whimsical. The Constitution

of the United States, before the adoption of the fifteenth amendment, in no wise interfered with this absolute power of the state to control the right of suffrage in accordance with its own views of expedience or propriety. It simply secured the right to vote for members of Congress to a definite class of voters of the state, consisting of those who were eligible to vote for members of the most numerous branch of the state legislature. Further than this, no power was given by the Constitution, before the adoption of the fifteenth amendment, to secure the right of suffrage to any one. The fifteenth amendment does not in direct terms confer the right of suffrage upon any one. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the states still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency."

This case held unconstitutional, as exceeding Congress' power under the Fifteenth Amendment, Section 5507 of the Revised Statutes, declaring it a crime to hinder or prevent another from exercising the right of suffrage, on the ground that it was not limited to deprivations based upon race.

Relevance of Adoption of the Seventeenth Amendment.

When the 17th Amendment was adopted, providing for popular election of Senators, language was included which declares:

> "The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language is identical to Art. I, Sec. 2, Cl. 1, which is the basis for the entire body of federal decisions holding that voter qualifications are vested entirely in the states. Since the Seventeenth Amendment was adopted subsequent to the Fifteenth, it is clear that as to Senators, it supersedes anything to the contrary in the latter, and in any event, it is indicative of the fact that it was never intended or understood that the Fifteenth Amendment had superseded the authority of the states to prescribe voter qualifications beyond the holding in **United States v. Reese**, 92 U. S. 214, 23 L. Ed. 563, 564 (1876), to wit:

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude."

Moreover, when the Seventeenth Amendment was under debate before Congress, the House rejected an amendment which would have destroyed the States' powers to prescribe qualifications for electors for Senator and Representative. It was defeated 123 to 189.

Musmamio, **Proposed Amendments to the Constitution**, House Doc. No. 551, 70th Congress, at page 221.

Thus, it is apparent that the Fifteenth Amendment was intended to go no further than to prohibit a denial of the franchise based upon racial grounds.

Moreover, the Act cannot be sustained under the "necessary and proper" clause.

The "necessary and proper" clause, Art. I, Sec. 8, Cl. 18, is not an independent grant of power. It was recently so held by this Court in **Kinsella v. United States ex rel. Singleton**, 361 U. S. 234, 247, 4 L. Ed. 2d 268 (1960).

In this case, the question at issue was whether the dependent wife of a peace-time soldier who accompanied him overseas could be tried by a court-martial under Sec. 2 (11) of the Uniform Code of Military Justice, without regard to Article 3, and Amendments 5 and 6 of the federal constitution. This Court held first, that the Statute could not be upheld under the grant of power contained in Article I, Sec. 8, Cl. 14, "To make rules for the Government and Regulation of the land and naval forces." To the Government's argument that the statute was sustainable under Art. I, Sec. 8, Cl. 18, the "Necessary and Proper" Clause, it was said:

> "If the exercise of the power is valid it is because it is granted in clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of Sec. 8 'and all other powers vested by this Constitution . . .'."

(d) **Literacy and Other Like Tests Constitute Legitimate Voter Qualifications and Do Not Violate the Fifteenth Amendment's Ban Upon Racial Discrimination in Voting.**

The earliest case is **Williams v. Mississippi**, 170 U. S. 213, 42 L. Ed. 1012 (1898), where a Negro indicted for murder in Mississippi moved to quash the indictment on the ground that under Mississippi law, qualification to serve on juries was dependent upon qualification as an elector, and as to the latter, Mississippi law imposed a literacy test and other procedures of such nature as to invite discrimination against the Negro race.

The holding of the Court denying this contention is summarized in the syllabus, viz.:

"The equal protection of the laws is not denied to colored persons by a state Constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers, which can be used to the abridgement of the right of colored persons to vote and serve on juries, when it is not shown, that their actual administration is evil, but only that evil is possible under them."

In **Trudeau v. Barnes**, 65 F. 2d 563 (C. C. 5th, 1933), a Negro brought action against a Louisiana registrar to recover damages for refusing to register plaintiff because of his inability to read and interpret a clause of the Constitution, as required by state law.

The Court upheld the law, declaring that it violated neither the Fourteenth nor Fifteenth Amendments, as it lays down but one test, that of intelligence, which is applicable equally to all.

In **Tullier v. Giordano**, 265 F. 2d 1 (C. A. 5th, 1959), also involving the Louisiana literacy test, the Court declared that "the qualification of voters is left to the several states subject to some limitations imposed by the United States Constitution." The Court then enumerated these limitations as being Art. I, Secs. 2 and 4; Art. II, Sec. 1; and the Fourteenth, Fifteenth, Seventeenth, and Nineteenth Amendments. Reviewing the evidence, the Court concluded that while plaintiff was discriminated against in the registration process, it was not on racial grounds, and hence did not fall within federal protection.

The leading case is **Lassiter v. Northampton County Board of Elections**, 360 U. S. 45, 3 L. Ed. 2d 1072 (1959).

This case was an appeal from a three-judge Federal Court, brought by a Negro seeking to have declared

unconstitutional a provision of the North Carolina Constitution imposing a literacy test as a requisite for voting, as being contrary to the 14th, 15th, and 17th Amendments.

At the outset, the Court, in a unanimous opinion by Mr. Justice Douglas, disposed of a question concerning a "grandfather clause" in the same state constitutional provision, not pertinent to the present inquiry.

As to the literacy test, it was said:

> "We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in Guinn v. United States, supra (238 U. S. at 366), disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawfull power vested in it not subject to our supervision, and indeed, its validity is admitted'."
>
> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U. S. 621, 633, 48 L. Ed. 817, 822, 24 S. Ct. 573; Mason v. Missouri, 179 U. S. 328, 335, 45 L. Ed. 214, 220, 21 S. Ct. 125, absent of course the discrimination which the Constitution condemns. Article I, Sec. 2, of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth Amendment in its provisions for the election of Senators provide that officials will be chosen 'by the People'. Each provision goes on to state that 'the electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State

Legislature'. So while the right of suffrage is established and guaranteed by the Constitution (Ex parte Yarbrough, 110 U. S. 651, 663-665, 28 L. Ed. 274, 278, 279, 4 S. Ct. 152; Smith v. Allwright, 321 U. S. 649, 661, 662, 88 L. Ed. 987, 995, 996, 64 S. Ct. 757, 151 A. L. R. 1110), it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See United States v. Classic, 313 U. S. 299, 315, 85 L. Ed. 1368, 1377, 61 S. Ct. 1031. While Sec. 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote', the right protected 'refers to the right to vote as established by the laws and constitution of the State'. McPherson v. Blacker, 146 U. S. 1, 39, 36 L. Ed. 869, 878, 13 S. Ct. 3.

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U. S. 333, 345-347, 33 L. Ed. 637, 641, 642, 10 S. Ct. 299) are obviously examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might

conclude that only those who are literate should exercise the franchise. Cf. Franklin v. Harper, 205 Ga. 779, 55 S. E. 2d 22, app. dismd. 339 U. S. 946, 94 L. Ed. 1361, 70 S. Ct. 804. It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. Stone v. Smith, 159 Mass. 413, 413, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards" (360 U. S. at pp. 50-53).

In footnote 7, the Court noted that 19 states now impose some sort of literacy test, including Georgia.

The Court noted, however, that literacy tests may be administered unfairly, or as held in **Davis v. Schnell**, 81 F. Supp. 1093, Aff'd. 336 U. S. 933, they may be void on their face when they confer such broad discretion in their administration as to indicate, in the light of persuasive legislative history, that they were intended and calculated to be an instrument of discrimination.

It was concluded:

"The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language'. That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we can not condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot" (pp. 53-4).

Further consideration should be given to some of the cases cited by the Court.

The case of **Guinn v. United States,** 238 U. S. 347, 59 L. Ed. 1340 (1915), cited by the Court in the **Lassiter Case,** concerned an indictment under what is now 18 U. S. C. A. 241, against Oklahoma election officials for having refused to permit Negroes to vote. The state law contained a so called "grandfather" clause whereby persons qualified to vote on January, 1866, were automatically qualified to vote, whereas all other persons were required to undergo a literacy test.

The Court concluded that the grandfather clause itself was void as being contrary to the Fifteenth Amendment, in that it set up a discrimination based on race. But it was expressly held that the Fifteenth Amendment's grant of power as to racial discrimination did not destroy the authority of the states over suffrage, viz.:

> "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."
>
> * * * * * * *
>
> "Thus the authority over suffrage which the states possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both" (p. 362).

And again, at page 366:

> "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and indeed, its validity is admitted."

While the literacy test considered alone was held to be valid, it was stricken down under principles of inseparability because of its being tied to the racial discriminatory features of the grandfather clause.

The case of **Pope v. Williams,** 193 U. S. 621, 48 L. Ed. 817 (1904), also cited by the Court, was an appeal by one Pope from a refusal of state authorities in Maryland to register him as a voter, because of his failure, upon moving to Maryland from elsewhere, to file notice of intention to become a citizen at least one year before applying to register, as required by state law, the latter being attacked as violative of the 14th Amendment.

The Court upheld the requirement, remarking that the right to vote is not conferred by the Constitution, and although the right to vote for a member of Congress comes in part from the Constitution,

> "But the elector must be one entitled to vote under the state statute" (p. 633).

The Court concluded:

> "The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution" (pp. 633-4).

The "conditions already stated", referred to above, had reference to discriminations based on race.

The case of **Mason v. Missouri ex rel. McCoffery**, 179 U. S. 328, 45 L. Ed. 214 (1900), also cited, was a mandamus from state Courts by Missouri registration officials, seeking to require the auditor of St. Louis to pay their expense incurred in administering the law. The auditor defended on the ground that the law was violative of equal protection because it set up separate and distinct registration procedures for citizens in St. Louis. In upholding the law, the Court declared:

> "The general right to vote in the state of Missouri is primarily derived from the state (United States v. Reese, 92 U. S. 214, 23 L. Ed. 563), and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise 'as regulated and established by the laws or Constitution of the state in which it is to be exercised'" (p. 335).

McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869 (1892), involved mandamus by nominees for presidential elector against the Michigan Secretary of State, seeking to have declared unconstitutional a recent Michigan statute governing election of presidential electors. The new statute provided for the election by districts of presidential and vice-presidential electors, and plaintiffs contended that the Constitution required the state to act as a unit, and delegate to subdivisions the right to select electors.

The Court rejected this attack, holding that "the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States", referring to Art. II, Sec. 1, Cl. 2 (p. 35).

No violation of the 14th or 15th Amendments was found, as the right of suffrage was held to be derived from state citizenship (pp. 37-8).

Davis v. Beason, 133 U. S. 333, 33 L. Ed. 637 (1890), upheld an act of the Territory of Idaho denying the franchise to bigamists and polygamists.

The case of **Davis v. Schnell**, 81 F. Supp. 872 (D. C. Ala. 1949), aff'd. 336 U. S. 933, involved the validity of the Boswell Amendment to the Alabama Constitution, which required that an applicant for registration "understand and explain" an article of the federal Constitution.

The Court, observing that this law conferred a virtually unlimited discretion, in that the "explanation" was not even required to be "reasonable", held it unconstitutional in the light of persuasive legislative history indicating that its clear legislative purpose was to serve as a means of discriminating against Negro applicants. The Court referred to a legislative history replete with speeches and statements by the Amendment's sponsors that such was its purpose.

If a literacy test is so arbitrary and without ascertainable standards on its face, the **Schnell** case and the recent decision in **Louisiana v. United States**, 380 U. S. 145, 13 L. Ed. 2d 709 (1965), teach that it will be held unconstitutional, and no new federal legislation is needed. As stated by the Alabama Supreme Court in **In re Opinion of the Justices**, 252 Ala. 351, 40 So. 2d 849, 855 (1949):

> "In order to meet the requirements of the Fifteenth Amendment and the discriminatory provisions of the Fourteenth Amendment, the standard of qualification and accompanying requirements must be of such a character as to furnish a reasonably marked guide for the boards of registrars in a judicial capacity to so act that there will not be in the ordinary course any discrimination in the application of the Fifteenth or Fourteenth Amendments."
>
> (For a table of states, showing the requirements of each with respect to literacy tests and other qualifications to vote, see 3 Race Rel. L. R. 390-1).

(c) The Presumption of State Discrimination in Voting Prescribed by Section 4 (b) of the Act, Being Arbitrary, and Unreasonable, Does Not Save the Act, and Leaves It Exposed as a Patently Unconstitutional Attempt by Congress to Displace State Qualifications for Voting.

For present purposes, we of course, concede the constitutional validity of the "freezing" principle developed by the Fifth Circuit Court of Appeals under which a finding of discrimination in voting in a given political subdivision is held to warrant the granting of relief in such a manner as to preclude the imposition of otherwise valid state voter qualifications until such time as the effect of past discrimination can be overcome, or until a general re-registration takes place. See **Louisiana v. United States**, 380 U. S. 145, 13 L. Ed. 2d 709 (1965); **United States v. Ward**, 349 F. 2d 795 (C. A. 5th, 1965); **United States v. Lynd**, 349 F. 2d 785 (C. A. 5th, 1965); **United States v. Ward**, 345 F. 2d 857 (C. A. 5th, 1965); **United States v. Parker**, 236 F. Supp. 511 (D. C. Ala. 1964); **United States v. Mississippi**, 339 F. 2d 279 (C. A. 5th 1964); **United States v. Ramsey**, 331 F. 2d 824 (C. A. 5th, 1964); **United States v. Atkins**, 323 F. 2d 733 (C. A. 5th, 1963); **United States v. Penton**, 212 F. Supp. 193 (D. C. Ala. 1962); **United States v. Duke**, 332 F. 2d 759 (C. A. 5th, 1964).

However, the obvious differences between that rule and the present act should be emphasized: (1) In the "freezing" cases, a "pattern or practice" of discrimination is established by competent evidence in a judicial hearing, whereas here a legislative presumption of a generalized character is sought to be established in lieu of evidence; (2) The freezing principle is involved only as to the particular voting unit found to be guilty of discrimination, whereas here the act falls on the entire state; (3) Under the freezing principle, the federal court-suspension

of voter-qualification laws is automatically ended by a general re-registration of all voters, whereas such is not true here.

Properly construed, Section 4 (b) is in reality a rule of substantive law, rather than a presumption, but it is akin to a presumption in that it is a legislative act which draws one inference from the existence of other stated facts.

As stated in **9 Wigmore on Evidence**, Sec. 2492, 3rd Ed.,

> "In strictness, there cannot be such a thing as a 'conclusive presumption'. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; **and to provide this is to make a rule of substantive law, and not a rule apportioning** the burden of persuasion as to certain propositions or varying the duty of coming forward with evidence."

The leading case on presumptions is **Bailey v. Alabama**, 219 U. S. 219, 55 L. Ed. 191 (1911), involving review of an Alabama conviction for intentionally defrauding of one's employer. The statute declared it a crime for any one, with intent to defraud, to enter into a written contract for service, secure advances, and then refuse to complete the service. The refusal to render the service, or to refund the money advanced, was declared to be prima facie proof of the intent to defraud.

The Court declared,

> "This Court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evi-

dence, in the courts of its own government. . . . In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and when the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law . . ." (p. 238).

Moreover, noting that here the state statute dealt with a subject matter proscribed by the 13th Amendment and federal statutes—peonage—it was further said:

"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the erection of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution . . ." (p. 239)

and,

"What the state may not do directly it may not do indirectly" (p. 244).

Applied to the present problem, it can be said that Congress can not supersede the State's power to define qualifications indirectly by framing the law in terms of a presumption.

In a later case, **Manley v. Georgia,** 279 U. S. 1, 7, 73 L. Ed. 575 (1929), a Georgia statute was held violative of due process which created a prima facie presumption of fraud by the directors of a bank upon a showing merely of insolvency of the bank, the Court declaring that "the connection between the fact proved and that

presumed is not sufficient. Reasoning does not lead from one to the other." That same year, another Georgia statute was declared void which raised a presumption of negligence on the part of a railroad merely upon a showing that an accident happened at its crossing, the presumption being characterized as "unreasonable and arbitrary." **Western & A. R. R. v. Henderson,** 279 U. S. 639, 644, 73 L. Ed. 884 (1920).

In another famous case, **Tot v. United States,** 319 U. S. 463, 87 L. Ed. 1519 (1943), a presumption created by Sec. 2 (f) of the Federal Firearms Act was held violative of the Due Process Clause of the Fifth Amendment. This presumption declared that upon a showing of a prisoner's prior conviction of crime and present possession of a firearm, the presumption arises that such firearm was received by him in interstate commerce, and that such receipt occurred subsequent to July 30, 1938, the date of the statute. The Court declared that the validity of a presumption is dependent upon the existence of a rational connection between the fact proved and the fact presumed—not the comparative convenience as between the parties of producing evidence relevant to the issue.

Just recently, in **United States v. Romano,** ... U. S. ..., 34 Law Week 4022 (1965), this Court held unconstitutional 26 U. S. C., Section 560 (b) (1), declaring that presence at an illicit still gives rise to a presumption of guilt of the offense of possession, custody, and control. The Court observed that mere presence at a still had been held sufficient to support a presumption as to the offense of "carrying on", as the latter is so broad that anyone "present" may legitimately be presumed to be engaged in one phase of "carrying on". However, mere presence alone, so the Court found, would not give rise to inference as to the specific aspect of the operation being engaged in by the accused. Therefore, the statute was held void under the "Rational Connection" test.

Also related to the present question is the recent decision in **Speiser v. Randall**, 357 U. S. 513, 2 L. Ed. 2d 1460 (1958). The California Constitution conferred a tax-exemption upon honorably-discharged veterans, but declared that such exemption is not available to anyone advocating violent or forcible overthrow of the government.

Implementing legislation required an annual application containing an oath by the applicant to the effect that he did not believe in such, etc.

Recognizing that the statute imposed an indirect restraint upon free speech, this Court passed over this question and held the statute invalid under due process as improperly placing the burden of proof—that the burden of proving one disqualified for the tax exemption should be on the state.

It is submitted that the presumption here created is patently arbitrary, and does not satisfy the required test of a rational connection between the fact proved and the fact presumed.

This arbitrariness is particularly emphasized as to Georgia. Under Georgia law, the literacy or citizenship test is submitted to the voter at the time he registers, not at the time he votes, Ga. Code Ann., Sections 34-617, 34-618 (Ga. Laws 1964 Ex. Sess., pp. 26, 57-58). For the 1964 election, of the 2,636,000 persons of voting age in Georgia, 1,666,778 were registered or a total of 63.2%. Consequently, Georgia is not brought under Section 4 of the Act by virtue of so much of Section 4 (b) as relates to registration, but comes under said section only by virtue of the number of persons who actually voted in 1964, which was **43.2%**. But the number of people who actually voted has nothing to do with the number of people who registered. In other words, Section 4 operates to set aside a requirement of Georgia law which is germane only at the registration stage, not by virtue of

something which happened then, but by virtue of something that happened later when the election was held. The Georgia literacy and citizenship tests have nothing whatever to do with voting, but only with registration. They could not possibly be used as a device for discrimination in voting, but at most in registration. Georgia meets the requirement of Section 4 as to registration, but not as to the number of people voting. Had only 80% of the Georgia voters registered in 1964 voted in the November General Election that year, Georgia would not have come within the Act at all. Assuming but not conceding that the fact that only 43.2% of registered voters voted in 1964 might be consistent with a finding of discrimination in the voting process itself; it by no means gives rise to any inference as to discrimination in registration, and the inference or "presumption" created by Section 4 operates to dispense with state law requirements at the registration stage, not at the voting stage. Georgia laws are thus sought to be suspended, not because of state action against which alone the Fifteenth Amendment is directed, but by virtue of individual action in the failure of a sufficient percentage of registered voters to vote. There is, therefore, no rational connection with the fact proved to the fact presumed, or to the result which flows therefrom. Moreover, there is no basis whatever for any presumption that the small voter turnout in 1964 was the result of discrimination in voting.

There have been only two cases to arise in Georgia involving claims of discrimination in the electoral process. The first was **Thornton v. Martin**, 1 Race Rel. L. R. 213 (M. D. Ga., 1955), and the second was **United States v. Raines**, 362 U. S. 17, 4 L. Ed. 2d 524 (1960); S. C. 203 F. Supp. 473 (M. D. Ga. 1961). Both of these cases involved alleged discrimination in the registration process. So far as we are advised, there have never been any

claims as to discrimination in Georgia in the actual voting procedure itself.

Secondly, the presumption sought to be established by Section 4 is patently arbitrary in that there is no rational connection between a small voter turnout and registration procedures. The seven states found by the Director of the Census to fall within Section 4 are Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. 30 Federal Register 9897 (1965); 10 Race Rel. L. R. 1397. With respect to illiteracy, the six southern states rank as follows, counting from highest percentage of illiterates down, 25 years and older:

Rank		Percentage
1.	Louisiana	21%
2.	South Carolina	20%
3.	Mississippi	18%
4.	Georgia	17%
5.	Alabama	16%
9.	Virginia	13%

With respect to average per capita income, these same six states rank as follows, beginning with the lowest 1959 per capita income and progressing up:

Rank		Per Capita Income
1.	Mississippi	$ 967.00
3.	South Carolina	1142.00
4.	Alabama	1246.00
10.	Georgia	1359.00
11.	Louisiana	1369.00
15.	Virginia	1598.00

(Source: 1960 Census of Population, per capita and Median Family Income in 1959, for States, Standard Metropolitan Areas, and Counties, PC(SI)-48, at p. 4).

It is more logical to assume that illiteracy and lack of wealth is responsible for a small voter turnout than it is to assume discrimination as the cause, for "discrimination is not to be presumed." **Snowden v. Hughes**, 321 U. S. 1, 88 L. Ed. 497 (1944).

Moreover, Section 4 transcends the separation of powers, for it by its nature necessarily constitutes an attempted adjudication of rights by Congress which only a court in a given case can do based upon evidence.

In **Kilbourn v. Thompson,** 103 U. S. 168, 192, 26 L. Ed. 377 (1881), the House of Representatives had passed a resolution declaring that the United States was a creditor of Jay Cooke & Co., which was in bankruptcy; that certain settlements had been made resulting in losses to the United States; and directing that an investigation be conducted by a Congressional Committee. A subpoena duces tecum was issued to Kilbourn, and upon his refusal to obey, he was taken into custody by officers of the House, who were now sued for damages.

After referring to the separation of powers scheme of the federal government, the Court declared that, looking to the wording of the resolution, the House of Representatives,

> ". . . not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial."

Similarly, Congress in this case has undertaken to weigh and adjudicate a controversy by legislatively declaring that the existence of certain circumstances necessarily gives rise to an inference which by no means logically follows. This is not only beyond Congress' power, but under due process considerations, i. e., the "rational connection" test, it is submitted that a court

could not here legitimately find the fact presumed from the mere facts stated.

The fact that a state has a low percentage of its voting age population registered could very easily result from any number of factors not condemned by the Fifteenth Amendment.

See also **Barenblatt v. United States,** 360 U. S. 109, 3 L. Ed. 2d 1115 (1959).

Congress admittedly could not validly enact a law prescribing qualifications for voters. It obviously can not enlarge its power in this respect by merely declaring that the present legislation is sustainable under the Fifteenth Amendment, nor can the same result be reached by stating an erroneous conclusion that certain facts give rise to an inference of discrimination. If Congress can simply by fiat declare that the abolition of literacy test is necessary to enforce the Fifteenth Amendment, it likewise can declare that freedom of speech must be sacrificed for the same reason.

A law is not void merely because it may be abused or improperly used. Were this so, no law would be valid, for laws necessarily must be administered by human beings, who perforce in some instances may err or act illegally. Where there is discrimination in administration, there are adequate judicial remedies to reach the problem. Also, when a law is so vague on its face as to confer an unbridled discretion peculiarly capable of discrimination, the courts will strike down the law itself on due process and Fifteenth Amendment grounds. **United States v. Louisiana,** supra.

If the provision be considered not as a presumption, but as a classification, the result is the same, for "arbitrary selection . . . cannot be justified by calling it classification", and the classification "must be based upon some real and substantial distinction, bearing a

reasonable and just relation to the things in respect to which such classifications are imposed," **Southern R. Co. v. Greene**, 216 U. S. 400, 417, 54 L. Ed. 536 (1910); **Gulf, Colorado & S. F. Ry. Co. v. Ellis**, 165 U. S. 150, 155, 41 L. Ed. 666 (1897); **Royster Guano Co. v. Virginia**, 253 U. S. 412, 415, 64 L. Ed. 989 (1920), and what the Fourteenth Amendment demands of the states, the Fifth requires of the federal government, for "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government." **Bolling v. Sharpe**, 347 U. S. 497, 500, 98 L. Ed. 884 (1954).

2. **Section 5 of the Act Is Unconstitutional.**

Under Section 5, laws affecting voter qualifications or procedures differently than those existing on November 1, 1964, and which are enacted by states for which a determination has been made under Section 4, can not become effective until adjudged valid in a declaratory judgment suit in the district court in the District of Columbia.

This is the most drastic law ever proposed. It purports to give the federal judiciary a veto power over state legislation, thereby constituting the federal courts in the District a part of the state's law-making power.

> "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states." **United States v. Cruikshank**, 92 U. S. 542, 23 L. Ed. 588 (1876).

Under the Constitution, Article 3, Section 2, it is only the "judicial power" which extends to the states. Section

5 of the Act does not constitute an application of judicial power. In **McChord v. L & N Railroad Co.**, 183 U. S. 483, 496, 46 L. Ed. 289 (1902), it was declared:

> "The Courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature of the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction" (p. 496).

As stated in **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228, 53 L. Ed. 150 (1908),

> "Litigation cannot arise until the moment of legislation is past."

To declare that a state statute shall not become effective until approved by a federal court is to make that court exercise something other than judicial powers. This fact is obviously recognized in the Act, for the authority is limited to the district court for the District of Columbia. The federal district courts in the states, being "Constitutional" or "Article 3" courts, can not exercise non-judicial powers, such as rendering advisory opinions. **Muskrat v. United States**, 219 U. S. 346, 55 L. Ed. 246 (1911); **Chicago & Southern Airlines v. Waterman Steamship Corp.**, 333 U. S. 103, 113 (1948); **United Public Workers v. Mitchell**, 330 U. S. 75, 89, 91 L. Ed. 754 (1947). Any attempt to confer "non judicial" jurisdiction on such a court is void. **Glidden Co. v. Zdanok**, 370 U. S. 530, 583, 2 L. Ed. 2d 671 (1962). Legislative powers can not be conferred on such courts. **United Steelworkers v. United States**, 361 U. S. 39, 4 L. Ed. 2d 12 (1959). On the other hand, the courts for the District of

Columbia, although held to be Article 3 courts are also held to have power to,

> ". . . perform any of the local functions elsewhere performed by state courts." **Glidden Co. v. Zdanok**, 370 U. S. 530, 581, 8 L. Ed. 2d 671 (1962); **O'Donoghue v. United States**, 289 U. S. 516, 545, 77 L. Ed. 1356 (1933), and see, **Ex Parte Bakelite Corporation**, 279 U. S. 438, 73 L. Ed. 789 (1929).

However, these "non judicial" powers exercisable by the District of Columbia courts obviously relate to matters arising within the geographical limits of the District. Therefore, insofar as the Article 3 or "judicial power" of the District Courts are concerned, Section 5 is not sustainable for it does not involve a judicial function; insofar as the "nonjudicial powers" of the District of Columbia courts are concerned (derived from Art. I, Sec. 8, Cl. 17, the "seat of government" clause), Section five does not come within the same as the subject matter in no wise involves matters having any situs, connection or nexus with the District. Consequently, there being no delegation of power in the Constitution to support it, Section 5 can not stand.

Moreover, the validity of Section 5, being dependent upon the irrational presumption sought to be raised by Section 4 of the Act (previously discussed, supra), must necessarily fall with the latter.

3. The Act Constitutes a Bill of Attainder.

In the Voting Rights Act, Congress undertakes by legislation to adjudge an entire section of the country guilty of crime (18 U. S. C. A. 241, 242) and impose a "penalty" whereby the laws of each such offending state would be suspended. This is done merely by legislative declaration, without the usual safeguards attendant upon a trial proceeding upon evidence and judicial rules of evidence and procedure.

Black's Law Dictionary defines "Bill of Attainder" as follows:

> "A legislative act, directed against a designated person, pronouncing him guilty of an alleged crime (usually treason), without trial or conviction according to the recognized rules of procedure, and passing sentence of death and attainder upon him. "Bills of attainder," as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a "bill of pains and penalties," but both are included in the prohibition in the Federal constitution. **Story, Const.**, Section 1344; **Cummings v. Missouri**, 4 Wall. 323, 18 L. Ed. 356; **Ex parte Garland**, 4 Wall. 387, 18 L. Ed. 366; . . ."

This Court has been very sensitive to the Constitutional guarantee prohibiting such laws when the rights of Communists are involved. See **Garner v. Board of Public Works**, 341 U. S. 716, 95 L. Ed. 1317 (1951).

And, just recently, in striking down as a bill of attainder, Section 504 of the Landrum-Griffin Labor Act, declaring it a crime for any member of the Communist Party to hold office or employment with a labor union, this Court noted that the prohibition (Art. I, Section 9) was designed as an implementation of the separation of powers scheme, was to be liberally construed, is not limited to statutes designed as punishment, and then concluded:

> "We cannot agree that the fact that Section 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named

individuals takes it out of the category of bills of attainder."

"We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in **Lovett** that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in **Lovett**; that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." **United States v. Brown**, ... U. S. ..., 33 Law Week 4603 (1965).

While usually such bills are directed against named individuals, they also can be directed against an entire class. **11 Am. Jur. 1175**, Section 347; **Cummings v. Missouri**, 4 Wall. 277, 18 L. Ed. 356 (1876); **United States v. Lovett**, 328 U. S. 303, 90 L. Ed. 1252 (1946). The Voting Rights Act is such a measure. It is a "wholesale bill of attainder". Rather than relying upon the already well-established powers of the federal courts to strike down discrimination upon proof in court, the Act undertakes to declare that an entire section of the United States is guilty—in part by association.

As stated in **16 Am. Jur. 2d 751**, Section 411:

"In the case of either bills of attainder or bills of pains and penalties, the legislative body, in addition to its judge, pronounces upon the guilt of the accused, without any forms and safeguards of trial, determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise, and fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

This, Congress can not do under the Constitution, Art. I, Sec. 9, Cl. 3.

4. The Act Violates the Equality of States.

The standard or "presumption" by which applicability of the basic sections of the Act are made to depend, being completely arbitrary and lacking in rationality, it is no different than if Congress had singled these states out by name, and declared that their voter qualification laws were thereby suspended.

> "Equality of constitutional right and power is the condition of all the States of the Union, old and new." **Escanaba & L. M. Transp. Co. v. Chicago**, 107 U. S. 678, 689, 27 L. Ed. 442 (1883).

In **Coyle v. Smith**, 221 U. S. 559, 580, 55 L. Ed. 853 (1911), this Court declared:

> "To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

See also, **49 Am. Jur. 229**, Section 9.

5. Section 14 (b) of the Act Is Unconstitutional.

This section provides as follows:

> "(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto."

The right of free access to the courts is one of the privileges and immunities of national citizenship. **Slaughter House Cases,** 16 Wall. 36, 79, 21 L. Ed. 394, 409 (1873); **NAACP v. Patty,** 159 F. Supp. 503 (D. C. Va. 1958), vacated on other grounds, 360 U. S. 167, and cf. **Chambers v. Baltimore R. Co.,** 207 U. S. 142, 52 L. Ed. 143 (1907). The right is so fundamental that it is included in the due process of law. **Ex Parte Hull,** 312 U. S. 546, 549, 85 L. Ed. 1034 (1941); **Hynes v. Dickson,** 232 F. Supp. 796 (D. C. Cal. 1964); **U. S. ex rel. Mayberry v. Prasse,** 225 F. Supp. 752 (D. C. Pa. 1963); **Hatfield v. Bailleaux,** 290 F. 2d 632 (C. A. 9th, 1961), cert. den. 368 U. S. 862.

A citizen complaining of discrimination in voting, or in legislative representation, has the unqualified right to sue in his home state. The Constitution deprivation suffered by one whose vote is diluted by the votes of those unqualified to vote is no less than that of the voter who is discriminated against because of race or residence, for "that right of suffrage can be denied by a debasement of dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise altogether." **Reynolds v. Sims,** 377 U. S. 533, 555, 12 L. Ed. 2d 506 (1964). On the other hand, a citizen of Georgia duly qualified as to literacy, and who complains that his vote is diluted by the votes of those incompetent under state law, must travel to the District of Columbia, with all the additional expense and hardship attendant thereto. This, in all due respect to the holding in **McCahn v. Paris,** 244 F. Supp. 871 (D. C. Va. 1965), is not equal protection of the law.

Moreover, the thrust of the section is even more harsh with respect to a local state official against whom suit is instituted under the act by the Attorney General. The former could not even assert the unconstitutionality of the Act as a defense. An indispensable facet of due process of law is the opportunity to present every avail-

able defense. **George Moore Ice Cream Co. v. Rose**, 289 U. S. 373, 384, 77 L. Ed. 1265 (1933); **Washington ex rel. Oregon R. & Navigation Co. v. Fairchild**, 224 U. S. 510, 56 L. Ed. 863 (1912); **In re Oliver**, 333 U. S. 257, 92 L. Ed. 682 (1948); **16 Am. Jur. 2d 979**, § 574.

Equal protection of the laws is denied where one class of litigants are "saddled" with "onerous" procedural requirements not imposed against others. **Oyama v. California**, 332 U. S. 633, 644, 92 L. Ed. 249 (1948); **Truax v. Corrigan**, 257 U. S. 312, 66 L. Ed. 254 (1921).

With respect to the standing of the state to assert these constitutional issues, the state obviously may assert the interest of its qualified voters, as this also affects the quality of the government which the state itself enjoys, **Georgia v. Pennsylvania Railroad**, 324 U. S. 439, 451, 89 L. Ed. 1051 (1945), and insofar as the rights of state election officials are concerned, it is enough to say that if the NAACP can assert the rights of its members, the State certainly has standing to assert the rights of its election officials, as its "nexus with them is sufficient to permit that it act as their representative before the Court." **NAACP v. Alabama**, 357 U. S. 449, 458, 2 L. Ed. 2d 1488 (1958).

IV.

CONCLUSION.

Congress cannot, in the Voting Rights Act of 1965, transcend the clear language of the Constitution, ignore almost 100 years of settled construction, and sustain the resulting product as "appropriate legislation" under the Fifteenth Amendment simply by declaring it to be so. Were it otherwise, there would be no reason why Congress might also conclude that proper enforcement requires that trial by jury, the privilege against incrimina-

tion, and every other vestige of the Bill of Rights be dispensed with.

As was cogently said by this Court thirty years ago,

> "Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the States so despoiled of their powers —or what may amount to the same thing—so relieved of their responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." **Carter v. Carter Coal Company**, 298 U. S. 238, 295, 80 L. Ed. 1160 (1936).

The "Voting Rights Act" of 1965 is unconstitutional, and this Court should so declare it.

Respectfully submitted,

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APPENDIX "A."

County	Population[1]	Registered Voters 1964[2]	Votes Cast for President in 1964[3]	Population of Voting Age in 1960[3] Total	Nonwhite Number	Nonwhite Percent	Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
Appling	13,246	9,843	4,159	7,263	1,401	19.3	$ 759	57.2%	21.7
Atkinson	6,188	3.472	1,968	3,298	812	24.6	604	59.6%	20.7
Bacon	8,359	4,715	3,315	4,739	536	11.3	876	69.9%	23.5
Baker	4,543	2,103	1,514	2,424	1,285	53.0	544	62.4%	20.3
Baldwin	34,064	8,716	6,170	25,344	9,235	36.4	850	24.3%	37.0
Banks	6,497	3,876	1,806	4,063	213	5.2	930	44.4%	28.0
Barrow	14,485	6,856	4,593	9,197	1,332	14.5	1,170	49.9%	28.8
Bartow	28,267	15,205	7,448	17,335	2,393	13.8	1,201	42.9%	26.8
Ben Hill	13,633	5,518	3,612	8,367	2,436	29.1	1,064	43.1%	29.3
Berrien	12,038	7,136	6,731	7,143	964	13.5	871	94.2%	25.3
Bibb	141,249	54,872	43,472	87,241	26,812	30.7	1,591	49.8%	26.7
Bleckley	9,642	4,695	3,556	5,908	1,380	23.4	956	60.1%	24.4
Brantley	5,891	4,326	2,140	3,238	384	11.9	811	66.0%	22.3
Brooks	15,292	4,747	3,369	8,770	3,711	42.3	736	38.4%	24.7
Bryan	6,226	3,590	2,290	3,400	1,111	32.7	814	67.3%	21.5
Bulloch	24,263	12,156	7,543	14,438	4,337	30.0	975	52.5%	23.9
Burke	20,596	5,069	4,242	10,958	6,600	60.2	629	38.7%	20.2
Butts	8,976	4,574	2,795	5,294	2,099	39.6	986	52.7%	26.0
Calhoun	7,341	2,039	1,355	4,047	2,393	59.1	705	33.4%	22.7
Camden	9,975	4,498	3,495	5,506	2,059	37.4	1,265	63.4%	21.8
Candler	6,672	3,779	2,505	3,914	1,200	30.7	749	64.0%	26.2
Carroll	36,451	14,250	9,778	22,829	3,595	15.7	1,170	42.8%	27.0
Catoosa	21,101	11,530	7,065	12,542	172	1.4	1,341	56.3%	25.2
Charlton	5,313	2,484	1,753	2,887	810	28.1	983	60.7%	21.1
Chatham	188,299	71,618	56,317	115,681	37,563	32.5	1,513	48.6%	26.2
Chattahoochee	13,011	541	437	9,891	1,830	18.5	1,766	04.4%	22.1
Chattooga	19,954	9,494	5,462	12,485	1,025	8.2	1,124	43.7%	27.9
Cherokee	23,001	13,450	6,587	14,481	517	3.6	1,068	45.4%	27.1
Clarke	45,363	16,807	12,394	30,635	6,740	22.0	1,480	40.4%	24.4

County	Population[1]	Registered Voters 1964[2]	Votes Cast for President in 1964[3]	Population of Voting Age in 1960[3] Total	Nonwhite Number	Nonwhite Percent	Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
Clay	4,551	1,293	904	2,571	1,441	56.0	915	35.1%	23.9
Clayton	46,365	20,378	16,357	26,452	2,456	9.3	1,586	61.8%	23.6
Clinch	6,545	2,693	1,790	3,629	1,256	34.6	828	49.3%	22.5
Cobb	114,174	52,949	37,510	67,859	4,568	6.7	1,762	55.2%	25.1
Coffee	21,953	13,685	7,111	12,659	2,977	23.5	894	56.1%	22.8
Colquitt	34,048	13,353	9,056	20,063	4,081	20.3	1,034	45.1%	24.9
Columbia	13,423	5,463	4,003	7,460	2,364	31.7	988	53.6%	22.0
Cook	11,822	7,860	3,395	6,968	1,755	25.2	$ 923	48.7%	25.2
Coweta	28,893	13,100	7,368	17,470	5,579	31.9	1,220	42.1%	26.4
Crawford	5,816	2,080	1,680	3,207	1,611	50.2	742	52.3%	21.6
Crisp	17,768	7,250	5,093	10,309	3,858	37.4	985	49.4%	25.6
Dade	8,666	5,422	2,605	4,873	70	1.4	990	53.4%	22.5
Dawson	3,590	2,162	1,571	2,149	1	(Z)	671	73.1%	22.2
Decatur	25,203	10,983	7,071	14,584	5,515	37.8	970	48.4%	24.2
DeKalb	256,782	117,740	86,602	160,574	12,407	7.7	2,136	53.9%	27.2
Dodge	16,483	12,869	5,661	9,720	2,328	24.0	928	58.2%	25.4
Dooly	11,474	5,117	3,133	6,447	2,866	44.5	704	48.5%	23.4
Dougherty	75,680	21,842	18,024	44,060	14,163	32.1	1,387	40.9%	23.0
Douglas	16,741	9,632	5,816	9,863	1,268	12.9	1,210	58.9%	24.6
Early	13,151	4,714	3,169	7,290	3,277	45.0	613	43.4%	23.3
Echols	1,876	896	583	1,078	246	22.8	822	54.0%	22.9
Effingham	10,144	4,261	3,356	5,764	1,756	30.5	960	58.2%	23.9
Elbert	17,835	10,389	5,059	10,879	3,127	28.7	1,023	46.5%	27.3
Emanuel	17,815	8,228	5,590	10,632	3,005	28.3	937	52.5%	26.7
Evans	6,952	3,371	2,371	4,046	1,308	32.3	882	58.6%	24.7
Fannin	13,620	8,266	6,267	8,142	31	0.4	979	76.9%	27.3
Fayette	8,199	not available	2,245	4,775	1,190	24.9	1,051	47.0%	24.4
Floyd	69,130	25,760	18,239	44,179	5,949	13.5	1,465	41.2%	28.4
Forsyth	12,170	6,539	3,153	7,332	4	0.1	963	43.0%	25.4
Franklin	13,274	10,953	3,622	8,387	776	9.3	962	43.1%	28.6
Fulton	556,146	224,031	166,745	364,941	117,049	32.1	1,941	45.6%	28.7

County	Population[1]	Registered Voters 1964[2]	Votes Cast for President in 1964[3]	Voting Age in 1960[3] Population of			Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
				Total	Nonwhite Number	Nonwhite Percent			
Gilmer	8,922	5,340	4,326	5,438	7	0.1	784	79.5%	26.4
Glascock	2,672	1,417	970	1,632	351	21.5	690	59.4%	27.5
Glynn	41,954	16,902	13,053	25,512	6,762	26.5	1,465	51.1%	25.1
Gordon	19,228	10,862	5,577	12,110	669	5.5	1,075	46.0%	27.7
Grady	18,015	6,176	4,870	10,569	3,364	31.8	828	46.0%	25.4
Greene	11,193	5,717	3,791	6,563	2,998	45.7	839	57.7%	25.6
Gwinnett	43,541	25,643	13,528	26,140	1,841	7.0	1,250	51.7%	25.0
Habersham	18,116	9,566	5,007	11,194	518	4.6	1,103	44.7%	25.0
Hall	49,739	17,963	12,299	30,515	2,789	9.1	1,321	40.3%	26.1
Hancock	9,979	2,794	1,999	5,303	3,576	67.4	620	37.6%	20.0
Haralson	14,543	6,276	5,315	9,213	642	7.0	1,240	57.6%	28.6
Harris	11,167	4,042	3,106	6,412	3,102	48.4	1,033	48.4%	24.7
Hart	15,229	6,740	4,308	9,214	1,832	19.9	$1,004	46.7%	26.2
Heard	5,333	3,140	1,868	3,251	590	18.1	842	57.4%	28.1
Henry	17,619	10,655	6,708	9,968	3,539	35.5	1,063	67.2%	23.3
Houston	39,154	13,651	10,790	21,970	4,228	19.2	1,555	49.1%	22.3
Irwin	9,211	5,000	2,757	5,361	1,602	29.9	739	51.4%	25.0
Jackson	18,499	8,135	5,617	11,537	1,309	11.3	1,117	48.6%	28.0
Jasper	6,135	2,894	1,923	3,630	1,705	47.0	826	52.9%	26.9
Jeff Davis	8,914	6,254	2,620	5,025	909	18.1	913	52.1%	22.6
Jefferson	17,468	5,406	4,203	9,717	4,780	49.2	725	43.2%	22.6
Jenkins	9,148	3,572	2,417	5,195	2,210	42.5	799	46.5%	23.9
Johnson	8,048	3,507	2,622	4,716	1,261	26.7	906	55.5%	25.5
Jones	8,468	4,708	3,185	4,840	2,185	45.1	877	65.8%	23.6
Lamar	10,240	5,165	3,118	6,196	2,118	34.2	1,187	50.3%	26.3
Lanier	5,097	2,398	1,380	2,914	756	25.9	772	47.3%	23.1
Laurens	32,313	16,055	9,285	19,462	6,284	32.3	978	47.7%	26.6
Lee	6,204	1,755	1,285	3,222	1,795	55.7	713	39.8%	19.6
Liberty	14,487	5,419	3,670	8,486	3,176	37.4	1,044	43.2%	21.8
Lincoln	5,906	2,280	1,296	3,310	1,336	40.4	690	39.1%	22.6
Long	3,874	2,670	1,582	2,162	635	29.4	692	73.1%	23.2

County	Population[1]	Registered Voters 1962[2]	Votes Cast for President in 1964[3]	Population of Voting Age in 1960[3] Total	Nonwhite Number	Nonwhite Percent	Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
Lowndes	49,270	15,048	11,174	29,205	8,459	29.0	1,281	38.2%	23.8
Lumpkin	7,241	3,360	2,044	4,579	79	1.7	932	44.6%	22.9
Macon	13,170	4,081	2,799	7,248	4,077	56.3	749	38.6%	21.6
Madison	11,246	4,979	3,531	6,951	989	14.2	847	50.7%	27.5
Marion	5,477	1,510	1,084	2,962	1,609	54.3	622	36.5%	20.5
McDuffie	12,627	4,372	3,781	7,365	2,740	37.2	1,033	51.3%	24.4
McIntosh	6,364	3,224	1,988	3,466	1,823	52.6	802	57.3%	21.4
Meriwether	19,756	6,124	4,673	11,537	4,990	43.3	932	40.5%	25.1
Miller	6,908	3,676	1,932	4,041	946	23.4	720	47.8%	25.8
Mitchell	19,652	6,375	4,462	11,026	4,971	45.1	887	40.4%	22.9
Monroe	10,495	4,425	3,243	6,259	2,652	42.4	1,033	51.8%	23.9
Montgomery	6,284	3,735	2,287	3,808	1,288	33.8	868	60.0%	24.7
Morgan	10,280	4,704	3,139	5,884	2,469	42.0	845	53.3%	24.1
Murray	10,447	6,126	3,490	6,260	51	0.8	953	55.7%	24.9
Muscogee	158,623	45,106	33,471	97,211	22,549	23.2	1,521	34.4%	24.2
Newton	20,999	10,111	6,298	12,812	3,767	29.4	1,131	49.1%	26.4
Oconee	6,304	2,767	2,314	3,909	681	17.4	942	59.1%	27.8
Oglethorpe	7,926	3,169	1,990	4,673	1,709	36.6	$ 727	42.5%	25.3
Paulding	13,101	8,513	4,427	7,956	603	7.6	1,198	55.6%	26.2
Peach	13,846	4,471	3,555	8,212	4,562	55.6	1,045	43.2%	23.3
Pickens	8,903	6,067	3,885	5,515	251	4.6	1,034	70.4%	26.8
Pierce	9,678	4,864	2,963	5,567	1,135	20.4	866	53.2%	24.3
Pike	7,138	3,723	2,010	4,227	1,643	38.9	785	47.5%	26.5
Polk	28,015	14,161	7,837	17,507	2,442	13.9	1,165	44.7%	28.7
Pulaski	8,204	3,682	2,721	4,861	1,843	37.9	1,028	55.9%	25.5
Putnam	7,798	3,590	2,214	4,501	2,204	49.0	967	49.1%	24.1
Quitman	2,432	693	607	1,288	707	54.9	603	47.1%	20.5
Rabun	7,456	3,987	2,347	4,435	43	1.0	903	52.9%	25.7
Randolph	11,078	3,387	2,618	6,541	3,663	56.0	853	40.0%	25.6
Richmond	135,601	43,636	35,026	86,100	24,785	28.8	1,422	40.6%	24.5
Rockdale	10,572	5,414	3,475	6,220	1,512	24.3	1,130	55.8%	24.5

County	Population[1]	Registered Voters 1964[2]	Votes Cast for President in 1964[3]	Population of Voting Age in 1960[3] Total	Nonwhite Number	Nonwhite Percent	Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
Schley	3,256	1,217	954	1,864	903	48.4	769	51.1%	23.1
Screven	14,919	5,439	3,706	8,286	3,729	45.0	744	44.7%	23.0
Seminole	6,802	3,408	1,721	3,903	1,255	32.2	747	44.0%	24.8
Spalding	35,404	12,983	10,229	21,909	5,252	24.0	1,436	46.6%	27.9
Stephens	18,391	9,290	4,854	11,330	1,355	12.0	1,200	42.8%	27.2
Stewart	7,371	1,950	1,410	4,146	2,681	64.7	757	34.0%	23.1
Sumter	24,652	7,700	5,501	14,440	6,710	46.5	1,028	38.0%	24.4
Talbot	7,127	1,869	1,306	3,944	2,507	63.6	676	33.1%	22.1
Talaferro	3,370	1,814	965	1,990	1,073	53.9	682	48.4%	26.1
Tattnall	15,837	9,336	4,912	10,512	3,135	29.8	704	46.7%	30.0
Taylor	8,311	3,123	2,469	4,771	2,004	42.0	730	51.7%	24.2
Telfair	11,715	5,673	3,786	7,025	2,087	29.7	749	53.8%	26.9
Terrell	12,742	3,552	2,490	7,095	4,057	57.2	746	35.0%	22.7
Thomas	34,319	13,433	9,563	20,823	7,644	36.7	1,142	45.9%	27.8
Tift	23,487	9,469	6,936	13,724	3,513	25.6	1,009	50.5%	23.9
Toombs	16,837	8,177	5,228	9,957	2,444	24.5	972	52.5%	25.3
Towns	4,538	3,708	2,429	2,943	1	(Z)	732	82.5%	24.1
Treutlen	5,874	3,691	2,053	3,441	968	28.1	735	59.6%	25.2
Troup	47,189	17,411	11,309	29,156	8,577	29.4	1,201	38.7%	28.0
Turner	8,439	3,087	2,391	4,957	1,535	31.0	802	48.2%	26.1
Twiggs	7,935	2,511	1,964	4,224	2,255	53.4	757	46.4%	20.0
Union	6,510	4,475	3,608	3,958	1	(Z)	722	91.1%	28.5
Upson	23,800	8,120	6,378	14,774	3,615	24.5	$1,341	43.1%	28.1
Walker	45,264	29,634	11,393	27,899	1,388	5.0	1,411	40.8%	26.8
Walton	20,481	7,485	5,224	12,468	3,076	24.7	1,047	41.8%	26.4
Ware	34,219	15,953	10,137	20,434	4,763	23.3	1,325	49.6%	26.7
Warren	7,360	2,074	1,454	4,135	2,224	53.8	661	35.1%	23.1
Washington	18,903	7,069	4,126	10,824	5,451	50.4	814	38.1%	24.1
Wayne	17,921	10,400	5,801	10,082	1,878	18.6	1,053	57.5%	22.7
Webster	3,247	812	601	1,750	975	55.7	475	34.3%	20.2
Wheeler	5,342	2,826	1,829	3,060	824	26.9	746	59.7%	24.9

County	Population[1]	Registered Voters 1964[2]	Votes Cast for President in 1964[3]	Population of Voting Age in 1960[3] Total	Nonwhite Number	Nonwhite Percent	Per Capita Income[4] 1960	% of Voting Age Pop. Voting for Pres. in 1964	% Illiterate Over 25
White	6,935	4,628	2,360	4,216	169	4.0	854	55.9%	24.5
Whitfield	42,109	19,791	11,849	25,522	1,085	4.3	1,409	46.4%	25.6
Wilcox	7,905	3,993	2,694	4,591	1,282	27.9	693	58.6%	26.3
Wilkes	10,961	4,438	3,089	6,722	3,101	46.1	1,015	45.9%	28.3
Wilkinson	9,250	4,056	3,135	5,414	2,279	42.1	977	57.9%	25.0
Worth	16,682	5,763	4,019	9,100	3,776	41.5	651	44.1%	21.3
Total	3,943,116	1,666,778	1,138,753	2,409,062	612,909	25.4%	$1,609	43.2%	25.9

1 1960 Census.

2 Secretary of State of Georgia.

3 Current Population Reports, 1960 Population of Voting Age and Votes Cast for President, 1964 and 1960, for States and Counties, Series P-23, No. 14, April 21, 1965, published by the Bureau of the Census.

4 1960 Census of Population, Per Capita and Median Family Income in 1959, for States, Standard Metropolitan Statiscal Areas, and Counties, PC (S1)-48, July 30, 1965, published by the Bureau of the Census.

APPENDIX B.

Georgia Constitutional and Statutory Provisions Governing Registration and Voting.

GEORGIA CONSTITUTION OF 1945.

ARTICLE II.

Section I. Qualification of Voters.

Paragraph I. Elections by ballot; registration of voters.—Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

Paragraph II. Who shall be an elector entitled to register and vote.—Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the People: Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.

Paragraph III. Who entitled to register and vote.—To entitle a person to register and vote at any election by the people, he shall have resided in the State one year next preceding the election, and in the county in which he offers to vote six months next preceding the election.

Paragraph IV. Qualifications of electors.—Every citizen of this State shall be entitled to register as an elector,

and to vote in all elections in said State, who is not disqualified under the provisions of Section II of Article II of this Constitution, and who possesses the qualifications prescribed in Paragraphs II and III of this Section or who will possess them at the date of the election occurring next after his registration, and who in addition thereto comes within either of the classes provided for in the two following subdivisions of this paragraph.

1. All persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or,

2. All persons who can correctly read in the English language any paragraph of the Constitution of the United States or of this State and correctly write the same in the English language when read to them by any one of the registrars, and all persons who solely because of physical disability are unable to comply with the above requirements but who can understand and give a reasonable interpretation of any paragraph of the Constitution of the United States or of this State that may be read to them by any one of the registrars.

Paragraph V. Appeal from decision of registrars.— Any person to whom the right of registration is denied by the registrars upon the ground that he lacks the qualifications set forth in the two subdivisions of Paragraph IV shall have the right to take an appeal, and any citizen may enter an appeal from the decision of the registrars allowing any person to register under said subdivisions. All appeals must be filed in writing with the registrars within ten days from the date of the decision complained of, and shall be returned by the registrars to the office of the clerk of the superior court to be tried as other appeals.

Section II. Registration.

Paragraph I. Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

PERTINENT SECTIONS FROM GEORGIA ELECTION CODE OF 1964 GA. LAWS 1964 EX. SESS., p. 26.

Section 34-602. Elector's qualifications; applicants acquiring age and residence qualifications within six months permitted to register; electors not required to reregister.—No person shall vote in any primary or election held in this State unless he shall be: (a) registered as an elector in the manner prescribed by law; (b) a citizen of this State and of the United States; (c) at least eighteen years of age; (d) a resident of this State at least one year next preceding the date of such primary or election, and of the county in which he seeks to vote at least six months next preceding the date of such primary or election; and (e) possessed of all other qualifications prescribed by law. Any person who possesses the qualifications of an elector except those concerning age or residence or both, shall be permitted to register to vote if such person will acquire such qualifications within six months after the day of registration, provided, however, that such person shall not be permitted to vote in a primary or

election until the acquisition of such qualifications. Notwithstanding any other provision of this Chapter, any person who was qualified and registered to vote at the time of the adoption of this Code shall not be required to reregister under the terms of this Chapter unless such person shall have become or becomes disqualified to vote, by reason of having been purged from the list of electors or for any other reason whatsoever, in which event, such person shall, in order to become registered to vote, reregister under the terms of this Chapter.

* * * * * * *

Section 34-608. Registration cards; supply; use.—The registrars of the several counties shall obtain a supply of registration cards which shall be used by them in connection with the application of those persons seeking to register as electors. The governing authority of each county shall pay the costs of registration cards and other supplies from county funds.

Section 34-609. Form of registration cards.—(a) The registration cards, for use by persons other than absentee applicants, shall be in substantially the following form and contain all the following, but the registrars may require additional information and provide for its inclusion on the card. The form may be printed on cards or separate sheets of paper, but for convenience, the card, or sheet or sheets of paper, shall be referred to as the "Registration Card."

REGISTRATION CARD

Name .....
(First) (Middle or Initial) (Maiden) (Last)
(Printed or Typed)

Election District .....

Mailing Address .....

Age..... Place of Birth.....
(Town or City) (County) (State)

Date of Birth..... Sex.....
(Month) (Day) (Year)

Color of Eyes..... Color of Hair.....

Weight..... Height..... Race.....

Occupation .....

Social Security No.....
(If known at the time of application.)

Mother's Maiden Name .....

Father's Name .....

Will assistance in voting be required in the manner permitted by Section 34-1317? (Yes) (No)

Georgia, ... County.

I do swear (or affirm) that I am a citizen of the United States and of the State of Georgia; that I am at least eighteen years of age, or will be on the .... day of ...., 19....; that I have resided in this State for at least one year, and in this county for at least six months, immediately preceding the date of this oath, or will have so resided on the .... day of ....., 19...,; that I possess the qualifications of an elector required by the laws of this State; that I am not registered to vote in any other county; that I am not registered to vote under any other name; that I have correctly answered

the questions appearing elsewhere on this card under the words: "Questions Propounded to Applicant"; and that the information contained elsewhere on this card is true.

(Sign here).....

(Signature shall be the same as name appearing elsewhere on card.)

Sworn to (or affirmed) and subscribed before me this .... day of ....., 19.....

.....

(Deputy) Registrar

Questions Propounded to Applicant.

Have you ever been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary? If so, what was the offense, the place and court of conviction and the approximate date? If so, and if pardoned, what was the date of the pardon?

Do you desire to qualify as an elector by reason of your ability to read and write the English language, or by reason of your ability to answer the standard list of questions?

.....

Board of Registrars

By: .....

(The space above shall be marked approved or rejected after the examination of the applicant's qualification.)

(b) The registration cards for use by applicants for absentee registration shall be in substantially the same form as the above form of registration card, except that the affidavit and "Questions Propounded to Applicant"

portions shall be eliminated and in lieu thereof the following form of affidavit shall be used:

I do swear (or affirm) that I am a citizen of the United States and of the State of Georgia; that I am at least eighteen years of age, or will be on the .... day of ...., 19....; that I have resided in this State for at least one year, and in the County of ..... for at least six months, immediately preceding the date of this application, or will have so resided on the .... day of ....., 19....; that my residence for voting purposes is located at ..... in such County; that my temporary address outside of this State is ....; that I am (a member of the armed forces of the United States and in active service)* (a member of the merchant marine of the United States)* (a civilian employee of the United States)* (a member of a religious group or welfare agency assisting members of the armed forces of the United States, and officially attached to and serving with such armed forces)* [(spouse)* (dependent)* of a person described in the above circled category]*; That I possess the qualifications of an elector required by the Constitution of the State of Georgia; that I am not registered to vote in any other county; that I am not registered to vote under any other name; that I have never been convicted in any court of competent jurisdiction of treason against the State of Georgia, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of the State of Georgia with imprisonment in the penitentiary, or if so convicted, that I have been pardoned; and that the information contained elsewhere on this card is true.

(Sign here) .....

(Signature shall be the same as name appearing elsewhere on card.)

(*Strike if not applicable.)

(This affidavit or affirmation must be sworn to or affirmed before an official authorized to administer oaths by the law of the place of executing this application.)

Sworn to (or affirmed) and subscribed before me this .... day of ....., 19.....

.....
(Signature of official administering oath.)

.....
(Typed or printed name and office of official.)

.....
(Typed or printed identification number, if any, and address of such official if security requirements permit.)

(c) The board of registrars may require that registration cards be executed in duplicate.

* * * * * * *

Section 34-612. Applications for registration; furnishing of information; administration and attestation of oath required of applicant.—Any person desiring to register as an elector shall apply to a registrar or a deputy and shall furnish such officer with information which will enable him to fill in all of the blanks appearing on the registration card. On completion of the form the officer shall administer the oath to the applicant and then have him sign it, and the officer shall then attest it. Upon request of the applicant, the officer taking the application shall read or repeat the oath distinctly to the applicant, and if the applicant cannot sign his name, the officer shall sign it for him, the applicant making his mark thereto.

Section 34-613. Referral of cards to registrars; rejection of applications; notification to and examination of applicants; alternative method of registration.—(a) All registration cards shall be referred to the registrars and examined by them within ten days from the date of the application. If the answer to the question propounded to the applicant relating to the offenses enumerated in Paragraph I of Section II of Article II of the State Constitution is answered in the affirmative and the applicant has not been pardoned, the registrars shall reject the application. If such question is answered in the negative, the board shall notify the applicant in writing to appear before it on a day and time certain. At that time, the applicant shall be subjected to an examination as to his qualifications. Such notice shall be given within five days after the date of the examination of the card. The examination of the applicant shall be conducted in accordance with the procedure hereinafter prescribed.

(b) Notwithstsanding any other provision of this Chapter, if additional places for registration have been designated, the chief registrar shall designate one or more registrars or one or more deputies, or any combination thereof, to act as a board of registrars for the purpose of taking applications for registration, examining applicants and registering persons to vote at each place of registration. Applicants who are qualified shall be registered to vote at the time of application. While so acting, such registrar or registrars, or deputy or deputies, or combination thereof, shall have all the rights and powers and shall be subject to all the limitations that are applicable to the board of registrars.

Section 34-614. Failure of applicant to give information or giving of false information.—The failure on the part of the applicant to disclose information sought by a direct question of the registration officers in connection with the taking of the application or at subsequent proceedings, or

the giving of false information, shall result in the application being rejected by the registration officers, and shall also be a cause for challenge, which, if sustained, shall result in the elector's name being removed from the list.

Section 34-615. Appeals from decisions denying or allowing registrations.—Any person to whom the right of registration is denied by the registration officers shall have the right to take an appeal to the superior court of the county, and any elector may enter an appeal to such court from the decision of the registration officers allowing any person to register. All appeals must be filed in writing with the board of registrars within ten days from the date of the decision complained of, and shall be returned by the board of registrars to the office of the clerk of such court to be tried as other appeals. Pending an appeal and until the final judgment of the case, the decision of the registration officers shall remain in full force.

Section 34-616. Storage and destruction of records of rejected applicants.—In the event an appellant is refused registration by the registration officers, the application of such person and other material and records relative thereto shall be placed on file with the other records of the board of registrars for at least two years from the date of refusal.

Section 34-617. Text of qualifications to be applied by registration officers.—When an applicant appears before the registration officers for examination, they shall proceed as hereinafter provided.

(a) If the applicant applies for registration and seeks to qualify on the basis of literacy, the registration officers shall submit to him a paragraph of the Constitution of the State of Georgia or of the United States and the applicant shall be required to read it aloud and write it in the English language. If the applicant reads the para-

graph intelligibly and writes it legibly, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered an elector. Otherwise, the registration card shall be marked rejected. If the applicant states that solely because of physical disability, he is unable to read or write, the paragraph shall be read to him by a registration officer and he shall be called upon to give a reasonable interpretation thereof. The interpretation shall give to the words the significance ordinarily attached to them by a layman of average intellect and attainments. If, in the opinion of the registration officers, the applicant gives such a reasonable interpretation, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered an elector. Otherwise, the registration card shall be marked rejected.

(b) If the applicant applies for registration and seeks to qualify on the basis of his good character and his understanding of the duties and obligations of citizenship under a republican form of government, he shall be given an examination based upon a standard list of questions as hereinafter provided.

(c) In all situations arising under this Code where the applicant or the elector, as the case may be, is required to be served with a notice of a hearing, such notice, unless otherwise provided herein, shall specify a date not less than three nor more than thirty days after the date of the notice. The notice may be served by mailing it to the applicant or the elector at the address given on his registration card. In the alternative, the registration officers may proceed to the examination of the applicant instanter and without notice.

(d) Failure to appear at the time specified in any notice given under the provisions of this Chapter shall consti-

tute cause for rejecting an application or of removing an elector's name from the list. In either event, no new application for registration shall be received from any such person until after the beginning of the next calendar year, provided, however, an application may be reinstated and an elector's name returned to the list if such person can satisfactorily account for his failure to appear at the time specified in such notice.

(e) In all cases under this Section and under this Chapter where an application is rejected or an elector's name is removed from the list, the registrars on the day of such event shall notify such person by mail directed to the address shown on the registration card. If any adverse decision is reached when such person is present and he is so notified by the board, no written notice shall be required.

Section 34-618. Oral Examination of applicants on standard questions.—The examination which the registration officers shall submit to an applicant who claims the right to register on the basis of good character and understanding of the duties and obligations of citizenship under a republican form of government, shall be based upon the following list of standard questions, and the questions on this list and no others shall be submitted to such applicant:

1. Who is the President of the United States?

2. Who is the Vice President of the United States?

3. Who are the two United States Senators from Georgia?

4. Who is the Governor of Georgia?

5. Who are the members of the General Assembly who represent you?

6. Who is the Congressman from your Congressional District?

7. What are the names of the persons who occupy the following offices in your county?

(1) Clerk of the Superior Court

(2) Ordinary

(3) Sheriff

(4) County School Superintendent

8. What are the names of the three branches of the United States government?

9. If the Governor of Georgia dies, who exercises the executive power, and if both the Governor and the person who succeed him die, who exercises the executive power?

10. Name five constitutional offices of the State of Georgia and give the names of persons now holding such offices?

11. How many Congressional Districts in Georgia are there and in which one do you live?

12. On what day and how often is the general election held in Georgia at which members of the General Assembly of Georgia are elected?

13. How are the members of the Board of Education selected in your county?

14. What officer of the county is in charge of general elections?

15. In what county office does a person return his property for State and county taxes?

16. How many Representatives and how many Senators are there in the General Assembly of Georgia?

17. Give the title of the presiding officer of the House of Representatives and the title of the presiding officer of the Senate in the Georgia General Assembly?

18. What are the terms of office for Senators and Representatives in the United States Congress?

19. Name the Judicial Circuit in which you reside and name the Solicitor General?

20. Name the Chief Justice of the Supreme Court of Georgia and the Chief Justice of the United States Supreme Court?

If the applicant can give correct answers to fifteen of the twenty questions propounded to him, possesses the other necessary qualifications and is not disqualified in any other way, the card shall be marked "approved" and the applicant shall be considered an elector; otherwise the applicant is rejected.

* * * * * * *

Section 34-620. Permanency of registration; biennial revision of records; registration.—(a) The electors who have qualified shall not thereafter be required to register or further qualify, except as provided by law. No person shall remain a qualified voter who does not vote in at least one general primary or general election, as provided in this Section, within a three-year period unless he shall specifically request continuation of his registration in the manner hereinafter provided.

(b) Within sixty days after the first day of January, beginning in the year 1965, and biennially thereafter, the registrars shall revise and correct the registration records in the following manner. They shall examine the registration cards and shall suspend the registration of all electors who have not voted in any general primary or general election within the three years immediately preceding such first day of January. On or before March 1st of such year they shall mail notice by first class mail to each elector, at his last known address, stating substantially as follows: "You are hereby notified that according to State law, your registration as a qualified voter will be cancelled for having failed to vote within the past three years, unless before April 1st of the current year you

continue your registration by applying in writing to the board of registrars." Effective April 1, 1965, and biennially thereafter, the registrars shall cancel the registration of all electors thus notified who have not applied for continuance, and the names of all such electors shall be wholly removed from the list of electors prior to May 1st of that year.

(c) Any elector whose registration has been thus cancelled may reregister in the manner provided for original registration in this law. No person shall remain an elector longer than he shall retain the qualifications under which he is registered.

Section 34-621. Filing of disqualification lists with registrars.—The clerk of the superior court of each county shall, on or before the 10th day of each month, prepare and file with the registrars a complete list, alphabetically arranged, of persons residing in the county who appear to be disqualified from voting by reason of having been convicted of a crime during the preceding month, the penalty of which is disfranchisement, unless such person has been pardoned and the right of suffrage restored to him. The ordinary of each county shall, by such date, file a similar list of all persons residing in the county who appear to be disqualified from voting by reason of an adjudication of idiocy or insanity during the preceding month. The local registrar of vital statistics of each county shall, by such date, file a similar list of those persons who have died during the preceding month. Each such list shall contain such other information as may be necessary to individually identify persons having the same or similar names.

Section 34-622. Preparation of electors list.—The registrars, not later than the voter registration deadline for the November election in each even-numbered year, shall begin the work of perfecting a true and correct list of

the electors of their county for use in such election. They shall place on such list only those persons they have found to be prima facie qualified to vote and those persons whom they shall subsequently find to be prima facie qualified to vote. In preparing such list, they shall examine the lists of disqualified persons furnished them and if any applicant's or elector's name is found thereon, they shall not place his name on the electors list. If the information comes to them after the preparation and filing of the list, they shall call upon him to show cause why it should not be removed from the list. They shall also indicate on such list the names of those electors who are eligible to receive assistance in voting and who have notified the registrars of such eligibility. The registrars shall proceed with their work of perfecting such list of electors and shall complete the same as soon as practicable but in no event later than five days prior to the November election.

Section 34-623. Filing of certified lists with superior court clerk and Secretary of State; obtaining lists from Secretary of State and board of registrars; arrangement of names; appearance of name on list as prerequisite to voting.—Within three days after completing such list of electors, the registrars shall file with the clerk of the superior court of their county and the Secretary of State a certified copy of such list. When requested, it shall be the duty of the Secretary of State or of the board of registrars, as the case may be, to furnish a certified copy of such list, or any part thereof, upon payment of a fee sufficient to cover the cost of preparing such list, but in no event shall the fee exceed an amount equal to one cent for the name of each elector appearing thereon. The list shall be alphabetically arranged by election districts and it shall be the list of electors for the November election to be held in such year. No person whose name does not appear on such list shall vote or be allowed to vote at such November election, except as hereinafter provided.

Section 34-624. Right of electors named on list to vote; purging lists; consolidating of lists.—Each elector whose name appears on such list, and who is not found to be disqualified subsequent to the filing of such list, shall be entitled to vote in any primary or election held during the period subsequent to the filing of such list and before the filing of the next such list; provided, however, that an elector, voting in the primary or primaries held by a single party for the nomination of candidates to seek public offices to be filled in an election, shall not vote in a primary held by any other party for the nomination of candidates to seek public offices to be filled in the same such election. It shall be the duty of the registrars to consolidate such list and any such supplemental list for any such primary or election and to make certain that no person is listed more than once.

* * * * * * *

Section 34-627. Right of registrars to re-examine qualifications of electors listed; subpoenaing of documents and witnesses; service of summonses; notices and subpoenas; notice of hearing to elector whose right to remain on list is questioned.—(a) The board of registrars of each county shall have the right and shall be charged with the duty of examining from time to time the qualifications of each elector whose name is entered upon the list of electors, and shall not be limited or estopped by any action previously taken.

(b) For the purpose of determining the qualification or disqualification of applicants and electors, the registrars may, upon at least five days' notice, require the production of books, papers and other material, and upon like notice may subpoena witnesses. The registrars may swear any witness appearing before them. If the registrars shall differ among themselves upon any question coming before them, the concurrent votes of two of the registrars shall control.

(c) The sheriff, his deputy, or any lawful constable of such county shall serve all summonses, notices and subpoenas, as issued by such registrars and placed in the hands of any such official. Such official shall receive such compensation as is provided for like services in the superior court. In case of the refusal of any person subpoenaed to attend or testify, such fact shall be reported forthwith by the registrars to the appropriate superior court, or to a judge thereof, and such court or judge shall order such witness to attend and testify, and, on failure or refusal to obey such order, such witness shall be dealt with as for contempt. Any witness so subpoenaed, and after attending, shall be allowed and paid the same mileage and fee as now allowed and paid witnesses in civil actions in the superior court.

(d) If the right of any person to remain on the list of electors, whose name appears thereon, is questioned by the registrars, they shall give such person written notice of the time and place of a hearing to determine such right which shall be served upon such person in the manner herein provided for other notices.

Section 34-628. Challenge of listed persons by other electors; proceedings upon challenge.—(a) Any elector of the county shall be allowed to challenge the right of registration of any person whose name appears upon the electors list, and upon a challenge as to the qualifications of the elector being filed, the registrars shall notify the elector and pass upon the challenge. Each challenge shall specify the grounds of the challenge, and when notice is given the elector by the registrars, a copy of such challenge shall be furnished the challenged elector at least three days before passing upon the same. Any elector of the county shall also be allowed to challenge the qualifications of any applicant for registration. A challenge of a person's qualification to register or to vote

shall be decided in every case by the board of registrars with the right of appeal therefrom to the superior court.

(b) Any other provision of this law to the contrary notwithstanding, no challenge as provided in this Section shall be valid as to a person who has registered to vote prior to March 25, 1958, on the grounds that such person does not come within either of the classes provided in the two subdivisions of Paragraph IV of Section I of Article II of the State Constitution.

(c) Any elector of the county shall be allowed to challenge the right to vote of any person whose name appears upon the electors list by making application to the board of registrars of the county at any time including election day itself. Such challenge may be oral or written but shall distinctly set forth the grounds of challenge. The board of registrars shall immediately consider the same and unless they find probable cause to sustain such challenge shall deny it. If the registrars find probable cause to sustain such challenge the poll officers of the challenged elector's district shall be notified and if practical the challenged elector shall be notified and afforded an opportunity to answer. If the challenged elector presents himself at the polling place to vote he shall be given an opportunity to appear before the registrar and answer the grounds of challenge, and such registrars shall: a. After hearing the challenger and the challenged elector, determine whether probable cause to sustain such challenge exists; b. If no probable cause exists, the challenged elector shall be permitted to vote. c. If in doubt as to the merit of the challenge shall permit the challenged elector to vote by having the word "challenged" written across the back of the challenged elector's ballot for later determination.

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NO. 22, ORIGINAL

In The

Supreme Court of the United States

October Term, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

PRELIMINARY STATEMENT

On September 29, 1965, the State of South Carolina lodged in this Court a motion for leave to file its complaint against Nicholas deB. Katzenbach, Attorney General of the United States, attacking the constitutionality of the Voting Rights Act of 1965, Public Law 89-110. Annexed to the motion was South Carolina's complaint and its brief on behalf of the State. On November 5, 1965, this Court entered its order granting the above-mentioned motion, scheduling the filing of an answer and briefs by the respective parties and setting the cause for oral argument on January 17, 1966. In addition, the Court's order provided

(1) that any State might submit a brief, *amicus curiae*, on or before December 20, 1965, and (2) that any such State desiring to participate in the oral argument, as *amicus curiae*, should file with the Clerk of the Court a request for permission to do on or before the same date. Pursuant to the permission conferred by this order, the instant Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, is filed.

THE STATUTE INVOLVED AND THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

Under consideration in this litigation is the Voting Rights Act of 1965, Public Law 89-110. Pertinent to a consideration of the positions taken by the Commonwealth of Virginia in the instant brief, *amicus curiae*, are the provisions of Section 4 of the Act which prescribe:

> SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United

States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that

a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

The interest of the Commonwealth of Virginia in this litigation arises from the circumstance that the Attorney General of the United States has determined—pursuant to Section 4(b) of the Act—that Virginia maintained on November 1, 1964, a "test or device" as defined in Section 4(c) of the Act, and the Director of the Census has similarly determined that less than 50 per centum of the persons of voting age residing in Virginia voted in the presidential election of November, 1964. Under Section 4(a) of the Act, the effect of these determinations has been to deprive the Commonwealth of Virginia of the right to require each of her citizens—without regard to race, color or previous condition of servitude—to make application to register to vote *in his own handwriting* as required by Section 20 of the Constitution of Virginia. As such, the Act exceeds the powers vested in Congress by the Fifteenth Amendment and unconstitutionally deprives the Commonwealth of Virginia of the right to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise, which right is secured to the Commonwealth by the provisions of Article I, Section 2, and the Tenth and Seventeenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

In essence, the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any election (Federal, State or local) because of his failure to comply

with any voter qualification test established by State law, in any State (1) which maintained a voter qualification test on November 1, 1964, and (2) in which less than 50 per centum of the resident persons of voting age were registered on November 1, 1964, *or* in which less than 50 per centum of the resident persons of voting age voted in the presidential election of November, 1964. In effect, the Voting Rights Act of 1965 abolishes any voter qualification test (including racially nondiscriminatory tests) in certain States *only*, i.e., those States falling within the ambit of one or the other of the two "50 per centum" formulae mentioned above.

The only provision of the Constitution of the United States upon which its advocates attempt to justify enactment of the legislation in question is the Fifteenth Amendment. In its entirety, that Amendment prescribes:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

The Commonwealth of Virginia submits that the Voting Rights Act of 1965 is constitutionally invalid because (1) in its direct operation and effect under the "50 per centum" formulae, the bill arbitrarily and unjustifiably includes within its terms States which are demonstrably free of any racial discrimination in the establishment or administration of their electoral processes and (2) in its direct operation and effect, the bill infringes the constitutional power of the individual States of the Union to impose such racially nondiscriminatory qualifications upon the exercise of the right

to vote as each State may select. In our brief we shall discuss these two fundamental objections to the challenged legislation *seriatim*.

It is well settled that Congress must have a rational basis for the findings upon which its legislation is predicated. However, no attempt to establish a valid factual premise for Congressional action with respect to voter discrimination in Virginia was made, other than to single out the completely unrelated circumstances that (1) Virginia maintained a voter qualification test on November 1, 1964, and (2) less than 50 per centum of the persons of voting age residing in Virginia *voted* in the presidential election of November, 1964. That more than 50 per centum of the resident persons of voting age in Virginia were *registered* on November 1, 1964, is incontrovertible, and the absence of any racial discrimination in Virginia with respect to the right to vote is established by other relevant evidence.

The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this purpose; yet it is manifest that the "50 per centum" formulae which activate the legislation in question operate to include within the ambit of the Act the Commonwealth of Virginia, in which State no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which suspends the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent. Legislation having such an effect is clearly without reasonable classification or rational justification, amounts to no

more than a mere arbitrary fiat and cannot constitute "appropriate" legislation under the Fifteenth Amendment.

Consideration of the second stated objection to the constitutionality of the Act begins with the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-Fourth Amendment). Thus, Article I, Section 2, of the Constitution of the United States and the Seventeenth Amendment provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature. Under these provisions, the qualifications of electors in Congressional elections must be those qualifications established by each State for electors of the most numerous branch of the State legislature. Moreover, this Court has repeatedly declared that a State is free to conduct its elections and limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the discrimination forbidden by that Amendment. The legislative history of the framing, adoption and ratification of the Fifteenth Amendment establishes beyond cavil the unassailable validity of the views so often and so consistently expressed by this Court on this subject.

In this connection, Virginia does not make the broad

(indeed, too broad) assertion that each State has the power to prescribe *any* voting qualifications it may see fit. It is the power to prescribe *racially nondiscriminatory* qualifications that each State constitutionally possesses, and when a State establishes such nondiscriminatory qualifications, it exercises a constitutionally protected power with which no branch of the Federal government may permissively interfere. When a State establishes such nondiscriminatory voting qualifications, it exercises a power wholly within the domain of the State and is insulated not only from Federal *judicial* review but from Federal *legislative* interference. It avails nothing for advocates of the constitutionality of the Voting Rights Act of 1965 to suggest that such insulation is not available when State power is used as an instrument for circumventing a federally protected right, for when a State's voting standards are, in fact, nondiscriminatory, they cannot be an instrument for such purpose nor come within the reach of Congressional power. Congress cannot substitute its own voting standards for the nondiscriminatory voting qualifications prescribed by a State without infringing the constitutionally established and judicially protected power of the States in this field.

ARGUMENT

I.

The Voting Rights Act of 1965 As Applied To Virginia And Other States Similarly Situated Violates The Fifth and Fifteenth Amendments To The Constitution of The United States In That The Classification Established Therein Is Unreasonable And Irrational.

As already noted, Section 4 of the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any federal, state or local election because of his failure to comply with any voter qualification test estab-

lished by state law, in any State or political subdivision thereof (1) which maintained a voter qualification test on November 1, 1964, as determined by the Attorney General of the United States, and (2) in which less than fifty per centum of the persons of voting age were registered on November 1, 1964, *or* in which less than fifty per centum of the persons of voting age voted in the presidential election of November, 1964.

The Attorney General of the United States has determined that the Commonwealth of Virginia has a "test or device" as that phrase is defined in the Act even though there is no "literacy" test as such. Under the Constitution and election laws of Virginia prospective voters are required to fill out a simple form in their own handwriting. Section 20, Constitution of Virginia and Sections 24-68, 24-69 and 24-71 of the Code of Virginia.

On November 1, 1964, more than fifty per centum of the persons of voting age residing in Virginia were registered, but the Director of the Census determined that fifty per centum of such persons did not vote in the presidential election of November, 1964. Thus, the provisions of the Voting Rights Act of 1965 became applicable in Virginia.

The registration procedure for all elections, federal, state and local, has been abolished in the Commonwealth of Virginia for the sole reason that fifty per centum of the qualified voters of the State exercised their right not to vote in the presidential election held on November 1, 1964.

(A) There Is No Rationality Of Connection Between The Facts Proved And The Ultimate Fact Assumed In The Act.

As the title indicates, the purpose of the Voting Rights Act is to enforce the provisions of the Fifteenth Amendment. In its entirety, this amendment prescribes:

"Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Section 2.

The Congress shall have power to enforce this article by appropriate legislation."

For the purposes of this brief, the Commonwealth of Virginia is not concerned with the fifty per centum formula of registered voters since more than fifty per centum of the resident persons of voting age were registered in the State on November 1, 1964.

The Commonwealth of Virginia first contends that the classification or triggering provision of the Act, namely, voter qualification tests are abolished in all states wherein fifty per centum of the resident persons of voting age failed to exercise their right to vote in the 1964 presidential elections, is unconstitutional on its face since there is no rational basis for the findings upon which it is predicated.

The constitutionality of the Act must "depend upon the rationality of the connection 'between the fact proved and the ultimate fact assumed'." *United States* v. *Gainey*, 380 U.S. 63, 13 L. ed. (2d) 658, at p. 662 (1965) and *Tot* v. *United States*, 319 U.S. 463 at p. 466, 87 L. ed. 1519 at p. 1524 (1943). See also, *United States* v. *Romano*, No. 2, October Term, 1965, decided November 22, 1965.

The facts proved are that in Virginia, in South Carolina, and in certain other states, including Alaska, "literacy" tests exist and fifty per centum of the resident persons of voting age of those states did not vote in the presidential election held in November, 1964. From these proved facts it is presumed that the Negro citizens of the states in ques-

tion have been denied their right to vote contrary to the guarantee of the Fifteenth Amendment. The Congress thereupon abolishes voter qualification tests in the states falling within the ambit of the aforesaid fifty per centum classification.

There may or may not be a sufficient rational connection between "literacy" tests and low registration to constitutionally presume a violation of the Fifteenth Amendment but, there is no valid rational connection between "literacy" tests, light voting, and discrimination.

By the passage of the triggering provisions of the Voting Rights Act, the Congress has declared that "literacy" tests and low registration result in discrimination. However, it has also found that light voting does not result in discrimination unless it is coupled with a "literacy" test. The following table,[1] indicating voting experience of the presidential election held in November, 1964, shows the fallacy of this presumed discrimination:

State	*Negro Population*	*% of Negro Population*	*Literacy Test*	*% of Both Races Voting*
Georgia	1,122,596	28	Yes	43
Louisiana	1,039,207	31	Yes	47
Texas	1,187,125	12	No	44

The Act presumes that there is no discrimination in Texas since there is no "literacy" test even though only forty-four per centum of the voting age population voted. Yet, in Louisiana wherein forty-seven per centum voted, the "literacy" test is abolished on the ground that its existence violates the Fifteenth Amendment.

The percentage of voting age persons in Arkansas who cast votes in the 1964 presidential election was less than fifty, but no discrimination is found to exist in that state.

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[1] Source: Bureau of Census.

The evidence produced at the hearings before congressional committees, upon which the statutory presumption found in the Voting Rights Act are presumed to be based, indicated that discrimination was effected by the use of tests or devices in some five states, excluding Virginia, covered by the Act. No evidence was produced which would indicate that persons who were properly registered with or without voter qualification tests were discriminated against when they voted or attempted to vote.

In *Tot, supra,* which appears to be the leading case on the question of statutory presumptions, this Court stated the rule of rational connection to be as follows:

> "* * * Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* * *" (319 U.S. at pp. 467-68).

Where, then, is the rational connection between "literacy" tests, voting after being properly registered and discrimination, which is required before this presumption of discrimination may be found valid? The Commonwealth of Virginia submits that there is none.

A "literacy" test and a light vote, as previously illustrated, do not necessarily go together. Light votes occur in the absence of "literacy" tests. Experience proves that apathy is the cause of a light vote. After registration, "literacy" tests, of course, cannot be the cause of light votes and, to repeat, there is no evidence that Negroes have been discriminated against when they exercise their right at the polls.

Under the rule of rational connection, a fact must have

more than mere relevance toward proving the existence of the ultimate fact presumed before the statutory presumption can be upheld. Here, the fact of a "literacy" test coupled with the fact of light voting is not even relevant in attempting to prove the existence of discrimination.

To paraphrase Justice Black in his dissenting opinion in *United States* v. *Gainey, supra*, 380 U.S. 63, 13 L. ed. (2d) 658 at p. 667:

> "When matters of trifling moment are involved, presumptions may be more freely accepted, but when consequences of vital importance to * [states] and to the administration of * [their election laws] are at stake, a more careful scrutiny is necessary."

The statutory presumption of discrimination based on the fact of a "literacy" test coupled with a light vote in certain states found in the Voting Rights Act violates the rational connection rule and is invalid.

(B) States Which Are Free of Any Racial Discrimination In The Administration of Their Electoral Processes Are Arbitrarily Included Within The Terms of The Act.

An act, valid on its face, may be assailed by proof of facts demonstrating that the act as applied to a particular class is without support in reason. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938).

The hearings before the Committee on the Judiciary of the United States Senate (1st Ses., 89th Cong.) on the Voting Rights Bill (S. 1564) do not, in fact, reveal the rationale of the classification found in the Act. Beginning on page 1447 of Part 2 of the report there is found an explanation of tables supposedly demonstrating the presump-

tion of voting discrimination where the use of tests or devices coincides with low voter participation.

1. The Department of Justice has uncovered evidence substantiated by court findings that in several states wherein the Act is applicable there has been a systematic effort to use "literacy" tests to disfranchise Negroes. (Report, p. 1450). *No such evidence has been found in Virginia.*

2. The registration data reveals a similar pattern in six of the seven states covered by the Act: a high percentage of white registration, a low percentage of non-white registration, a low voter turn out and the use of "literacy" tests. (Report, p. 1454). *Virginia does not have a high percentage of white registration and, by comparison, has a high percentage of non-white registration.*

This registration data, Table B-1, is found on p. 1472 of the said Senate report and is as follows:

State	*White Voting Age Population 1964*	*White Registration*	*%*	*Non-White Voting Age Population 1964*	*Non-White Registration*	*%*
Alabama	1,413,270	935,695	66.2	501,730	92,737	18.5
Alaska	112,470			25,530		
Georgia	1,966,456	1,124,415	57.2	569,544	167,663	25.0
Louisiana	1,353,495	1,037,184	76.6	539,505	164,601	30.5
Mississippi	794,277	525,000	66.1	448,723	28,500	6.4
South Carolina	975,660	677,914	69.5	404,340	138,544	34.3
Virginia	2,060,751	1,133,702	55.0	480,249	177,321	36.9*

3. It is alleged that similarity exists among the states, excluding Alaska, caught under the Act's classification because all of them *within the past ten years* have had a general public policy racial segregation evidenced by statutes in force in the areas of travel, recreation, schools and hospital facilities. (Report, p. 1454). *As to Virginia, such*

allegations are utterly ridiculous. The Commonwealth of Virginia operates integrated schools, integrated hospitals and integrated recreational facilities. Furthermore, intrastate travel as well as interstate travel is integrated.

The Attorney General's attempt to establish a "valid factual premise" for Congressional action with respect to voter discrimination in Virginia is also completely refuted by the findings of the United States Civil Rights Commission.

In its 1961 Report on Voting, the Commission declared:

> "The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States; Arkansas, Oklahoma, Texas, and Virginia." (Volume 1, p. 22).
>
> * * *
>
> "In three States—Louisiana (where there is substantial discrimination), Florida (where there is some), and Virginia (where there appears to be none) —official statistics are compiled on the State level by county and by race." (Volume 1, p. 102).

In view of the *facts*, it is unarguably apparent that no racial discrimination exists in Virginia with respect to the right to vote. This circumstance completely undermines the indispensable factual foundation upon which the Voting Rights Act is based. The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this pur-

pose; yet it is manifest that the "light voting" formula which activates the Act operates to include within its ambit States in which no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which would suspend the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent.

This Court, in *United States* v. *Carolene Products Co., supra,* said:

> "* * * the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.* * *" (304 U.S., at p. 153).

To repeat, the fact of voting discrimination does not exist in Virginia. Accordingly, the Act, when applied to Virginia, is clearly without a reasonable classification and amounts to no more than a mere arbitrary fiat which cannot meet the requirements of the Fifth Amendment or constitute "appropriate" legislation under the Fifteenth.

II.

The Voting Rights Act Of 1965 Exceeds The Authority Conferred Upon Congress By The Fifteenth Amendment And Infringes Powers Reserved To The States By Article I, Section 2, And The Tenth and Seventeenth Amendments Of The Constitution Of The United States.

As previously noted, the Voting Rights Act of 1965, in its direct operation and effect, completely abolishes the use

of any voter qualification test prescribed by State law (including racially nondiscriminatory tests) in those States falling within the scope of its activating provisions. In Argument I of this brief, the Commonwealth of Virginia has taken the position that these activating provisions are arbitrary, irrational and invalid *per se*, and that they are demonstrably so when viewed in light of the specific circumstances relating to Virginia. The argument there made would be equally applicable regardless of the nature of the substantive provisions of the Act purporting to provide a remedy for alleged violations of the guarantee of the Fifteenth Amendment.

In the present segment of our brief, counsel for the Commonwealth assert that the substantive provisions of the Act exceed the authority of Congress under the Fifteenth Amendment and infringe the power reserved to the States to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise—specifically the power to impose literacy requirements, applicable to all citizens alike, as a precondition of the right to vote. This assertion, in turn, would be equally applicable regardless of the validity or invalidity of the activating provisions of the Act, *i.e.*, even if the challenged legislation applied throughout the length and breadth of the United States.

On this aspect of the instant case, the Commonwealth's position is fundamentally posited upon the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-fourth Amendment).

Thus, Article I, Section 2,[1] of the Constitution of the United States and the Seventeenth Amendment[2] provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature, while the Tenth Amendment[3] reserves to the States all powers not conferred upon the Federal government.

When one remembers—as this Court pointed out in *United States* v. *Cruikshank*, 92 U. S. 542, 551—that:

> " 'The government of the United States is one of delegated powers alone, its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States.' "

it necessarily follows that Congress has no power to suspend the racially nondiscriminatory voting qualifications of any State, unless that power is conferred upon Congress by the Fifteenth Amendment. That such authority is conferred upon Congress by the Fifteenth Amendment we emphatically deny.

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[1] The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2] The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

[3] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

A. Legislative History Of The Fifteenth Amendment

An appeal to history is in order here. Such an appeal would be appropriate in any litigation in which this Court was called upon to test the power of Congress to enforce any of the Civil War Amendments. It is especially appropriate in the instant case when so vast and revolutionary a power is asserted by Congress as that contained in the Voting Rights Act of 1965, with no suggestion of constitutional warrant for such action other than the forty-six words which comprise the Fifteenth Amendment in its entirety.

Of course, no lengthy citation of decisional authority to support the propriety of such an appeal is required. On numerous occasions this Court has not only sanctioned such an approach to the consideration of delicate and important constitutional questions, but has confirmed the indispensability of such research to the proper resolution of grave constitutional issues. Clear, succinct and irrefutable support for such a resort to history is readily available in the decisions of this Court in *Adamson* v. *California,* 332 U. S. 46; *Ullmann* v. *United States,* 350 U. S. 422; and *Bell* v. *Maryland,* 378 U. S. 226.

In the *Adamson* case, Mr. Justice Black pointed out that (332 U. S. at 72):

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex parte Bain, 121 U. S. 1, 12, 30 L ed 849, 853, 7 S Ct 781, that 'It is never to be forgotten that in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, *we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.*'" (Italics supplied)

Moreover, in the *Ullmann* case, Mr. Justice Frankfurter —speaking for the Court—declared (350 U. S. at 428):

> *"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."* (Italics supplied).

Finally, in the recent case of *Bell* v. *Maryland, supra,* Mr. Justice Goldberg approached the consideration of an analogous situation with the following admonition (378 U. S. at 288-289):

> "Of course, our constitutional duty is 'to construe, not to rewrite or amend, the Constitution.' Post, page 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution *requires,* however, *that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve."* (Italics supplied).

In the case at bar, the Commonwealth of Virginia has undertaken to document the history of the framing and adoption of the Fifteenth Amendment, so far as that history relates to the central issue now under discussion. The relevant data available from the records of the Fortieth and Forty-First Congress on this point are enlightening and, we submit, determinative in favor of the position taken by the Commonwealth. So copious has the available material proved to be that the Commonwealth has collected it in an appendix to this brief entitled "The Legislative History Of The Framing And Adoption Of The Fifteenth Amendment With Respect To The Power Of The States To Prescribe Qualifications For Exercise Of The Franchise, With Special Reference To The Establishment By The States Of Literacy

Requirements As A Pre-condition Of The Right To Vote." Counsel for the Commonwealth believe that it would be inappropriate to burden the body of this brief with a synopsis of the above-mentioned document; indeed, we seriously question whether such a synopsis would be permissible in view of the over-riding importance of this litigation. We respectfully invite the Court's attention to the study contained in this appendix, for on the basis of it the Commonwealth makes the following unqualified assertions:

(1) It was clearly understood and repeatedly acknowledged by the Framers of the Fifteenth Amendment—not only those in favor of the amendment in the form in which it was adopted, but those who favored a broader amendment and those opposed to any amendment at all—that:

(a) The only limitation imposed by the Fifteenth Amendment upon the States was that prohibiting the States from conditioning the right to vote on race, color or previous condition of servitude; and

(b) The power of the States to regulate the right of suffrage upon any other grounds applicable to all citizens alike—particularly upon the grounds of property and educational qualifications—remained with the States unfettered by the amendment; and such qualifications, regardless of their impact upon any particular class of citizens, might be established by each State without violating either the letter or the spirit of the Fifteenth Amendment.

(2) The validity of the above-stated propositions is so clearly and incontrovertibly established by the

legislative history of the framing and adoption of the Fifteenth Amendment that no impartial mind—whether of litigant, lawyer or jurist—could either dissent from these propositions or fabricate from the relevant historical material any argument to the contrary.

B. Judicial Decisions.

Thoroughly consistent with the propositions irresistibly derived from an analysis of the legislative history of the Fifteenth Amendment has been an uninterrupted line of decisions of this Court. These decisions, rendered in cases considered since the adoption of the Fifteenth Amendment, dispel in conclusive fashion any doubt concerning the validity of the fundamental position of the Commonwealth of Virginia that each State is free to limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all upon the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the specific discrimination forbidden by that Amendment.

Minor v. *Happersett,* 88 U. S. (21 Wall.) 162 (1875) provides an appropriate point of departure for demonstrating the ancient lineage and current vitality of the law supporting this position. The ultimate question presented in that case was whether or not a provision of the Constitution of Missouri which excluded females from the right of suffrage was violative of the Fourteenth Amendment to the Constitution of the United States. Resolution of this question entailed consideration of the subordinate inquiry of whether or not the right of suffrage was one emanating

from the United States Constitution. Holding that the Constitution did "not confer the right of suffrage upon anyone," this Court declared (21 Wall., at 177-178):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

United States v. *Reese,* 92 U. S. 214 (1876) involved consideration of the validity of §§ 3 and 4 of the Enforcement Act of 1870 (16 Stat. 140) under which indictments had been laid against certain inspectors of a municipal election in Kentucky for refusing to receive and count the vote of a Negro citizen of the United States. Invalidating the provisions of law there in question, this Court stated (92 U. S. at 217-218, 220):

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. . . . If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.
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> "This leads us to inquire whether the Act now under consideration is 'appropriate legislation' for that

purpose. *The power of Congress to legislate at all upon the subject of voting at state elections rests upon this Amendment.*

* * *

"In view of all these facts, we feel compelled to say that, in our opinion, the language of the 3d and 4th sections *does not confine their operation to unlawful discrimination on account of race, etc.*

* * *

"Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if *it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts* are authorized to, and when called upon in due course of legal proceedings *must, annul its encroachments upon the reserved power of the States and the people.*" (Italics supplied).

Referring to the *Reese* case, *supra,* in its subsequent decision in *United States* v. *Harris,* 106 U. S. 629 (1882), this Court pointed out (106 U. S. at 637):

"The attempt was made by the counsel for the United States to sustain the law as warranted by the Fifteenth Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that amendment. *The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting, on account of his race, color, or previous condition of servitude, but also those who hindred or delayed the free white citizen. . . .*" (Italics supplied).

In *Pope* v. *Williams,* 193 U. S. 621 (1904), this Court sustained the validity of a voting registration statute of the State of Maryland and during the course of its opinion observed (193 U. S. at 632, 633-634):

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.*

* * *

"The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, *and this court has no concern with them.*" (Italics supplied).

Thereafter, commenting upon the validity of an Oklahoma literacy test statute in *Guinn* v. *United States*, 238 U. S. 347 (1915), this Court asserted (238 U. S. at 362, 366):

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage *which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority*

of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

* * *

"No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, *its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted.*" (Italics supplied).

Subsequently, in *Breedlove* v. *Suttles*, 302 U. S. 277 (1937), this Court sustained the validity of a poll tax requirement of the State of Georgia in the following language (302 U. S. at 283):

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. *Privilege of voting is not derived from the United States, but is conferred by the State and,* save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.*" (Italics supplied).

Recently, this Court reaffirmed the validity of State prescribed literacy tests in *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959). Validating a statute of the State of North Carolina imposing such a test, the Court stated (360 U. S. at 50-51):

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . . So while the

> right of suffrage is established and guaranteed by the Constitution . . . *it is subject to the imposition of state standards which are not discriminatory* and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' *the right protected 'refers to the right to vote as established by the laws and constitution of the State.'*" (Italics supplied).

Finally, during this very year, in *Carrington* v. *Rash*, 380 U. S. 89 (1965), this Court confirmed (380 U. S. at 91):

> *"There can be no doubt either of the historic function of the States to establish, on a non-discriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.* Indeed, the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . . 'In other words, the privilege to vote in a State *is within the jurisdiction of the State itself, to be* exercised as the State may direct, and upon such terms, as to it may seem proper, provided, of course, no discrimination is made between individuals in violations of the Federal Constitution.'" (Italics supplied).

See also, *United States* v. *Cruikshank, supra; Davis* v. *Beason*, 133 U. S. 333; *Ex Parte Yarbrough*, 110 U. S. 651; *McPherson* v. *Blacker*, 146 U. S. 1; *Wiley* v. *Sinkler*, 179 U. S. 58; *Mason* v. *Missouri*, 179 U. S. 328 *James* v. *Bowman*, 190 U. S. 127.

Of course, the foregoing canvass of prior decisions of this Court does little more than rehearse the obvious and particularize the uncontroverted. So uniform has been the course of these decisions, so consistest the voice and so constant the teachings of this Court on the subject under consideration, as to compel invalidation of Section 4(e) of the Act on the very first occasion of a challenge to the constitutionality of the statute in a Federal court. This was the conclusion reached by the United States District Court for the District of Columbia in *Morgan* v. *Katzenbach*, C. A. No. 1915-65 (decided November 15, 1965). So recent is this decision and so pertinent its reasoning to the position taken by the Commonwealth of Virginia in this case as to merit extended quotation of its language in the body of this brief:

> "The question presented in this case is whether *the Congress has constitutional power to regulate by statute the qualifications of voters and to supersede the requirements prescribed by the States.* Specifically the issue is the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which in effect provides that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting under any literacy test. As a corollary, the ultimate problem is whether *this provision of the Act of Congress supersedes the literacy test for voters prescribed by the constitution and statutes of the State of New York*, which impose the ability to read and write English as a requirement for voting.
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> * * *
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> *"Traditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate.* Thus Article I, Section 2,

of the Constitution of the United States, provides as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

It will be observed that this Section does not include the power to prescribe requisites for the right of suffrage. Power to make or alter regulations concerning 'the times, places and manner of holding elections' does not comprise authority to regulate qualifications for voters. No express or implied power is conferred by the Constitution on Congress to legislate concerning requirements for voters in the several States. The matter is within the purview of the Tenth Amendment, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States. In *Minor* v. *Happersett,* 21 Wall. 162, 177, Mr. Chief Justice Waite, in speaking for a unanimous bench, stated:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

In that case it was held that the States had the power of excluding women from the right to vote. It required a Constitutional amendment to grant suffrage to women.

In *Pope* v. *Williams*, 193 U. S. 621, 632, the same theory was again enunciated:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* (Emphasis supplied).

The doctrine that the right to vote is not a privilege derived from the United States, but is conferred by the State, was reiterated in *Breedlove* v. *Suttles*, 302 U. S. 277, 283, in the following manner:

> Privilege of voting is not derived from the United States, but is conferred by the State and, save

> as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate*. (Emphasis supplied).

In that case the Supreme Court unanimously held that the States had power to impose a poll tax as a prerequisite for voting. It required a Constitutional Amendment to eliminate the exaction of poll taxes as a condition precedent to voting in Federal elections.

Only within the past year the Supreme Court again restated the same propositions in *Carrington* v. *Rash*, 380 U. S. 89, 91, as follows:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams*, 193 U. S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50. Compare *United States* v. *Classic*, 313 U. S. 299; *Ex parte Yarbrough*, 110 U. S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams*, *supra*, at 632.
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> * * *

The case of *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, decided in 1959, is practically on all fours with the case at bar. The State of North Caro-

line prescribed a literacy test for voters in the English language. A voter brought suit in the Federal court for a declaration that the requirement was unconstitutional. The Supreme Court unanimously upheld the validity of the test and the power of the State to impose it. In its opinion, which was written by Mr. Justice Douglas, the Court discussed the authority of the States *vis-a-vis* the power of the Congress in this field, in the following illuminating manner, p. 50:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. Article 1, § 2 of the Constitution in its provision for the election of Members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People." Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not

> taxed), speaks of "the right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the State." *McPherson* v. *Blacker,* 146 U. S. 1, 39.

There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. That Amendment reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The latest Constitutional Amendment in this field is the Twenty-Fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. That Amendment reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. *So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment.* If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage.

* * *

We have given due consideration to the presumption of validity which attaches to every Act of Congress. *That presumption, however, is completely overcome and destroyed by the inescapable conclusion that we have reached from the foregoing discussion* to the effect that Section 4(e) of the Voting Rights Act of 1965, *transgresses the powers granted to Congress* and, therefore, is repugnant to the Constitution and invalid." (Italics supplied).

In light of these decisions, it is manifest that for almost a century this Court has consistently and repeatedly proclaimed the power of each State under the Federal Constitution to establish racially nondiscriminatory criteria governing the exercise of the elective franchise of its citizens. The language in which this fundamental power of the indi-

vidual States has been declared, reaffirmed and protected consists of such plain English words that he who runs may read and the ingenuity of man cannot evade them. The legislative history of the framing and adoption of the Fifteenth Amendment and the decisions of this Court to this day echo without dissonance the voices of the Founding Fathers as exemplified by the writings of both Madison and Hamilton in various portions of The Federalist:

> "The first view to be taken of this part of the government, relates to the *qualifications of the electors*, and the elected.
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> "Those of the former, are to be the same, with those of the electors of the most numerous branch of the state legislatures. The definition of the right of suffrage, is very justly regarded *as a fundamental article of republican government.* It was incumbent on the convention, therefore, to define and establish this right in the constitution. *To have left it open for the occasional regulation of the congress, would have been improper for the reason just mentioned.* . . . To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state; *because it is conformable to the standard already established, or which may be established by the state itself.* It will be safe to the United States; because, being fixed by the state constitutions, it is not alterable by the state governments, and it cannot be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution." (No. 52).
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> * * *
>
> "*Suppose an article had been introduced into the constitution, empowering the United States to regulate*

the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle, in this case, would have required no comment; . . ." (No. 59).

* * *

"The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. *The qualifications of the persons who may choose* or be chosen, as has been remarked upon another occasion, *are defined and fixed in the constitution; and are unalterable by the* [*National*] *legislature." (No. 60).* (Italics supplied).

Clearly, the prescription of racially nondiscriminatory qualifications upon the right to vote is the exercise of a power vested in each State by the Constitution of the United States. If this power rests with the States under the Constitution—as is unarguably true—then its exercise may not be interdicted by the Congress or any department of the Federal government, under the Fifteenth Amendment or any other provision of the Constitution. If the *constitutional* powers of the States could be thus manipulated out of existence by the *legislative* action of Congress, the guarantees of our Constitution are illusory indeed.

C. The Voting Rights Act of 1965.

Against the background of the legislative history of the Fifteenth Amendment and the judicial exposition of that amendment reviewed in Section A and Section B, respective-

ly, of this portion of our brief, counsel for the Commonwealth submit that the Voting Rights Act of 1965 manifestly exceeds the authority conferred upon Congress by the Fifteenth Amendment and clearly encroaches upon the powers reserved to the States to regulate the right of suffrage by prescribing racially nondiscriminatory qualifications as a precondition of the right to vote. In its direct operation and effect, the Act suspends the racially nondiscriminatory requirement of Section 20 of the Constitution of Virginia that every citizen of the Commonwealth who wishes to exercise the elective franchise must register to vote in his own handwriting. The ultimate result of the operation of the Act is to compel Virginia to engage in *the indiscriminate registration of illiterates* and to afford illiterates as a class, whether of the white or the colored race, the right to vote in all elections.

Within narrow compass, the Act would clearly be unconstitutional upon the authority of the *Reese* and *Harris* cases alone. As this Court stated in the latter case, the "sole object" of the Fifteenth Amendment was "to protect from denial or abridgement . . . *on account of race, color, or previous condition of servitude,* the right of citizens of the United States to vote." *United States* v. *Harris, supra,* at 637. (Emphasis supplied). At the same time the Court pointed out that it had invalidated §§ 3 and 4 of the Enforcement Act of 1870 in the *Reese* case because those provisions were so "broad" that they punished not only those "who hindered and delayed the franchised *colored* citizen from voting, on account of his race, color or previous condition of servitude, but also those who hindered or delayed the free *white* citizen." *Id.* at 637. (Emphasis supplied). Thus, to the extent that Congressional legislation predicated upon the Fifteenth Amendment has the effect of enfranchising the citizens of a State without regard to their race,

or protecting the right of citizens to vote from any discriminaion other than race, such legislation transcends the limitations of the Fifteenth Amendment. How can it possibly be intimated that legislation which has the inescapable effect of affirmatively enfranchising illiterates of the *white* race constitutes "appropriate" legislation under a constitutional provision "whose sole object" was to prevent the disenfranchisement of *colored* citizens *because of their race?* To the extent that the Act requires Virginia to register illiterates of the white race, it obviously collides with the rationale of the *Reese* and *Harris* decisions and is invalid.

In broader compass, the Act is unconstitutional to the extent that it abolishes the racially nondiscrimination literacy requirements of any State and mandates the enfranchisement of illiterates generally. No one suggests that Congress has been delegated the authority to protect citizens of the United States from discrimination in the exercise of the right to vote upon the ground of literacy. On the contrary, the right of a State to limit its electorate upon this ground has been expressly confirmed in the *Guinn* and *Lassiter* cases. In the latter case, this Court pointed out that a literacy test may be unconstitutional on its face, or that a literacy test—fair on its face—may be employed to achieve the racial discrimination condemned by the Fifteenth Amendment. However, with respect to the literacy test of North Carolina there under consideration, the Court observed (360 U. S. at 53-54):

> "The present requirement, *applicable to members of all races,* is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person be literate, not a calculated scheme to lay springes for the citizen." (Italics supplied).

Just such a situation exists in the Commonwealth of Virginia. Under Virginia law, a prospective voter is required to fill out in his own handwriting a form indicating the applicant's age, date and place of birth, residence and occupation at the time of registration and for one year next preceding, whether or not he has previously voted, and if so, the State, county and precinct in which he last voted. These requirements are not only reasonable but are utterly devoid of any racial connotation whatever, and their imposition neither denies nor abridges anyone's right to vote because of race or color. Under the Constitution of the United States, Virginia has the power to impose these nondiscriminatory voter qualifications upon its citizens, and the Congress has no authority whatever to suspend them or vary these requirements in the slightest degree.

Let us attempt to clarify the position of the Commonwealth on this point and emphasize its validity by reference to an analogy with which, we venture to suggest, no one will disagree. Section 2 of the Fourteenth Amendment authorizes Congress to reduce the basis of representation of States in the House of Representatives whenever the right to vote in a State is denied or abridged except upon stated grounds. By contrast, the right of a State to equal representation in the Senate of the United States by two Senators, each of whom shall have one vote, is a right guaranteed to each State without qualification by Article V of the Constitution. If the Congress of the United States—purporting to act under the Fifteenth Amendment—should enact a law diminishing Senate representation in those States in which the right to vote has been denied or abridged upon the ground of race, would such a law be constitutional? Manifestly not, and we do not believe that anyone would have the temerity to suggest that it would be. In enacting appropriate legislation under the Fifteenth

Amendment, it simply does not lie within the power of Congress to violate other provisions of the Federal Constitution which expressly guarantee certain rights to, and confer certain powers upon, the States or other independent coordinate branches of the Federal government. *Yet the right to prescribe racially nondiscriminatory voting qualifications is one no less vested in the States by the Federal Constitution than the right to equal representation in the Senate. If the latter right of the States cannot be infringed by Congress under the Fifteenth Amendment, the former right equally cannot be.*

Other analogies readily lend themselves to the support of Virginia's position in the case at bar. The Fourteenth Amendment prohibits a State from excluding its citizens from jury service upon the ground of race or color, and Congress is empowered to enforce the guarantees of the Fourteenth Amendment by appropriate legislation. If it should be conclusively established to the satisfaction of Congress, and the world at large, that a particular State was, in fact, so discriminating, would it lie within the power of Congress to suspend the right of trial by jury in such State under the guise of enforcing the guarantees of the Fourteenth Amendment? Similarly, if it should be conclusively established to the satisfaction of Congress, and the world at large, that a State was altering the boundaries of its political subdivisions along racial lines for the purpose, and with the effect, of infringing the right of the colored citizens of such subdivisions to vote—as, indeed, it was established to the satisfaction of this Court in *Gomillion* v. *Lightfoot*, 364 U. S. 339—would it lie within the power of Congress to suspend by statute the right of that State to alter the boundaries of its political subdivisions under any circumstances? It needs no argument to demon-

strate that the powers of Congress are not so sweeping and unlimited.

With respect to the considerations which determine the propriety of Congressional action under the powers delegated to that body by the United States Constitution, the recent decision of this Court in *Aptheker* v. *Secretary of State*, 378 U. S. 500, is highly relevant to, and consistent with, the contentions made by Virginia in the instant litigation. In that case, the Court invalidated Section 6 of the Subversive Activities Control Act of 1950 which forbade members of certain Communist organizations from making application for, or using, or attempting to use a passport issued under the authority of the United States. Enunciating the principles governing judicial consideration of the exercise of Congressional power there in question, this Court declared (378 U. S. at 508, 509, 512, 514):

> "It is a familiar and basic principle, recently reaffirmed in NAACP v. Alabama, 377 US 288, 307, 12 L ed 2d 325, 338, 84 S Ct 1302, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation *may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.*'
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> * * *
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> "In applying this principle the Court in NAACP v. Alabama, supra, referred to the criteria enunciated in Shelton v. Tucker, supra, 364 US at 488, 5 L ed 2d at 237:
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> > " 'Even though the governmental purpose be legitimate and substantial, *that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breadth of legislative abridgment must be viewed in the light of less

drastic means for achieving the same basic purpose.'

* * *

"At the same time the Constitution requires that the powers of government '*must be so exercised as not*, in attaining a permissible end, *unduly to infringe' a constitutionally protected freedom.*

* * *

"In determining the constitutionality of § 6, *it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective* of safeguarding our national security.

* * *

"In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, *sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. . . . The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,'* cf. Cantwell v. Connecticut, 310 US at 307, 84 L ed at 1219, yet here, *as elsewhere*, precision must be the touchstone of legislation so affecting basic freedoms." (Italics supplied).

See also, *Griswold* v. *Connecticut*, 381 U. S. 479; *NAACP* v. *Button*, 371 U. S. 415.

Surely, no one will suggest that judicial protection of the constitutional powers of the States from unwarranted encroachment by the Federal government is a matter of less concern to this Court than the protection of the constitutional rights of citizens from such encroachment. Nor can it be contended that the criteria for testing the validity of Congressional action which affects State powers are less severe or apply less stringently than those which determine the propriety of Congressional action touching personal liberties. Thus, a constitutional purpose to enforce the pro-

visions of the Fifteenth Amendment may not be achieved by enactments "which sweep unnecessarily broadly and thereby invade" an area constitutionally reserved exclusively for State regulation; nor may such Congressional purpose "be pursued by means that broadly stifle fundamental" State powers "when the end can be more narrowly achieved." *Aptheker* v. *Secretary of State, supra,* at 508. Moreover, in determining the constitutionality of Congressional action to enforce the Fifteenth Amendment, it is important to consider whether "Congress has within its power 'less drastic' means of achieving" its objective. *Id.* at 512.

Tested in the light of these principles, the Voting Rights Act of 1965 falls to the ground on all counts. Congressional legislation which openly and admittedly suspends the power of the States to prescribe racially nondiscriminatory voting qualifications obviously sweeps "too widely and too indiscriminantly" across the powers constitutionally reserved to the States. *Id.* at 514. Moreover, that Congress has within its power "less drastic means" of achieving its purpose is too apparent to be questioned. In the *Aptheker* case, this Court made reference to a "Message from the President—Issuance of Passports" as indicating the view of the Executive Branch of the government that our national security could be protected by means "more discriminately tailored" to the constitutional liberties of individuals. *Id.* at 514. One has only to read the Minority Report of the Committee on the Judiciary accompanying H. R. 6400 (which bill became, in substance, the Voting Rights Act of 1965) to see clearly one of the available means for enforcing the Fifteenth Amendment which is "more discriminately tailored" to the constitutionally protected powers of the States with respect to the establishment of racially nondiscriminatory voting qualifications.

Enactment of legislation which would effectively enforce the guarantees of the Fifteenth Amendment without im-

permissibly trespassing upon the reserved powers of the States involves no exercise in legislative legerdemain. In its simplest form, such a statute need only provide that when a specified number of citizens allege in a Federal district court that they have been denied the right to register to vote because of their race or color, and that State officials have not taken prompt steps to remedy this situation, the district court shall hear the matter as expeditiously as possible. If the district court finds that the allegations of the complaint are supported by evidence, it may appoint an examiner to receive the application of the complainant—and others similarly situated—and review the acceptability of such person under qualifications upon the right to vote imposed by State law. If the court appointed examiner finds any such person qualified to vote under State law, he shall transmit the name of such person to the appropriate State official, who shall place such name upon the voting rolls, and such person shall thereafter be permitted to vote. Additional provisions for review of the Federal examiner's decision could be made, with the right to vote protected during the pendency of review. A statute enacted within this framework would effectively enforce the provisions of the Fifteenth Amendment and still leave intact the constitutional power of the States to prescribe voting qualifications.

Surely, in light of these and other options available to it, Congress possessed less drastic means of achieving its purpose in this instance. Equally manifest is it that—in an area where "precision must be the touchstone" of legislation affecting so fundamental a power of the States—the Act in question is not a regulation "narrowly drawn to prevent the supposed evil. . . ." *Id.* at 514. On the contrary, the Act uproots the most fundamental power of the States in this field and, in effect, repeals the relevant provisions of Article 1, Section 2, and the Tenth and Seventeenth Amendments to the Constitution of the United States.

CONCLUSION

On March 29, 1965, the Attorney General of Virginia testified before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives of the United States in opposition to H. R. 6400 which, in substance, became the Voting Rights Act of 1965. On that occasion, he began his testimony with the statement that the proposed bill was:

> ". . . among the most dangerous pieces of legislation ever offered in the Congress of the United States. I make this statement advisedly, for I earnestly believe it goes further than any step yet attempted to erode the basic concepts of constitutional government in which the individual States are acknowledged to be sovereign. The legislation is not only patently unconstitutional, but it is shockingly discriminatory."

Consistent with this statement, counsel for the Commonwealth of Virginia now submit that upon mature consideration and analysis it will be seen that the enactment of the Voting Rights Act of 1965 presents a deplorable example of Congress at its worst. Ambitious of result but reckless of means, Congress has enacted legislation which is utterly without constitutional foundation and destitute of judicial support. With respect to the definition of the right of suffrage—a subject everywhere regarded as fundamental to representative government and one over which the powers of the Nation and the States were precisely allocated by the Constitution—the Congress has now destroyed that balance of power by enacting a statute which "runs a plow-share through all the State Constitutions and overturns the most important State regulations that can be found." Appendix, p. 17. This "plow-share"—now legislative in character—is

precisely the implement which was repeatedly sought, *without success*, to be legally placed in the hands of Congress by constitutional amendment. That power which the framers of the Fifteenth Amendment and the ratifying States were unwilling to confer upon Congress is now attempted to be exercised by Congress without pretense of constitutional warrant.

Thus, the issues presented in this litigation reach far beyond and rise high above the mere validity or invalidity of Congressional action, for the legislation here under consideration involves the fundamental structure of the Union and seeks to undermine the very form of government under which we live. The importance of the maintenance of the framework of government established by the Constitution to the protection of individual liberty was recently made clear by Mr. Justice Harlan in his address dedicating the Bill of Rights Room in New York City on August 9, 1964, when he emphasized that the framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have*. And they determined that in *a government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied).

Of course, on that occasion, Mr. Justice Harlan did not single out for consideration the right of suffrage and the division of powers between the Federal and State governments over this subject. But the power of the States to define the right of suffrage is a basic structural element of the governmental edifice erected by the Constitution and one indispensable to our federalism. Speaking of it, and of the inevitable results of any trespass upon it by the Congress,

Mr. Chief Justice White long ago declared in *Guinn* v. *United States,* 238 U. S. 347, 362, that the power was one:

> ". . . which has belonged to those governments from the beginning, and *without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground.* (Italics supplied).

Clearly, all history teaches what the decisions of this Court confirm—that the power of the States to regulate the right of suffrage and to prescribe racially nondiscriminatory qualifications for voting is original and independent, not derivative or subordinate. This power is not granted to the States by any law, but remains with the States where it has existed since the formation of the Union, and it has never been lodged anywhere else. If this power may be suspended by the Congress today under the guise of enforcing one provision of the Constitution, what other powers of the States may not also be suspended tomorrow upon a similar pretext? If the revolutionary assertion of Congressional authority embodied in the Voting Rights Act of 1965 should receive the sanction of this Court, the original landmarks of liberty in this land will have been irretrievably lost, and this Court will have placed its imprimatur upon a present day manifestation of that doctrine against which it warned a century ago in *Ex Parte Milligan,* 71 U. S. (4 Wall.) 2, 120, 121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of

men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.*" (Italics supplied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia, as *amicus curiae*, in the above-captioned matter, hereby certify that copies of the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of December, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Daniel R. McLeod, Esq., Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina, and David W. Robinson, Esq. and David W. Robinson, II, Esq., Special Counsel, P. O. Box 1942, Columbia, South Carolina, counsel for plaintiff State of South Carolina; and upon Nicholas deB. Katzenbach, Esq., Attorney General of the United States, and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, defendant and counsel for defendant respectively.

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Assistant Attorney General

DEC 2 (
JOHN F. DAVI

APPENDIX TO BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA, AMICUS CURIAE

NO. 22, ORIGINAL

In The

Supreme Court of the United States

October Term, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS DEB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

The Legislative History Of The Framing And Adoption Of The Fifteenth Amendment With Respect To The Power Of The States To Prescribe Qualifications For Exercise Of The Franchise, With Special Reference To The Establishment By The States Of Literacy Requirements As A Precondition Of The Right To Vote.*

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A. The Original House Version.

When the Third Session of the Fortieth Congress met in December, 1868, the Republican majority had safely weathered the fall elections, securing the White House with Grant as the new President, and re-electing a safe majority in both branches of Congress. Proposals for amending the Constitution to secure suffrage for Negroes were widespread.[1] Moreover, proposals were submitted which would have instituted universal manhood suffrage.[2]

The 1868 Republican Party platform had declared that

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*Original research and preparation of material contained herein was prepared by Dr. Alfred Avins, Professor of Constitutional Law, Memphis State University.

"the question of suffrage in all the loyal States properly belongs to the people of those States," and the Democratic minority was not slow in objecting to any amendments based on this platform.[3]

The original draft by the Senate Judiciary Committee simply banned discrimination based on race, color, or previous condition of servitude.[4] Senator James Dixon, a Connecticut conservative, noted that under this draft "in all other respects the State is left free to prescribe is own restrictions."[5] He bore down on the Republican platform promise to leave suffrage to the states.[6] He was followed by Senator Samuel C. Pomeroy of Kansas, a Radical Republican, who proposed to change the committee draft to ban discrimination in suffrage "for any reasons not equally applicable to all citizens of the United States." Pomeroy, who had voted for the Fourteenth Amendment, noted that "If you want a condition of intelligence, of education, of any quality that applies equally to all, it can be adopted by the States under the amendment that I have proposed.[7] He was willing, in addition, to have age and residence restrictions, but urged women's suffrage as well as voting rights for Negroes.[8]

That same day, in the House of Representatives, Congressman Samuel Shellabarger, an Ohio Republican, objected to the form of the constitutional amendment submitted on behalf of the House Judiciary Committee by Congressman George S. Boutwell of Massachusetts, a Radical Republican, which was similar to the original proposition of the Senate Judiciary Committee, because the "committee propose simply to prohibit the States from making discriminations among the various classes of citizens, based upon . . . race, color, or previous condition of slavery." He urged universal manhood suffrage instead. Referring to the committee draft, he declared:

"The consideration which I say seems to me almost fatal to his plan is, that it leaves still, substantially, the great mischief unremedied which the exigencies upon us demand that we shall correct; and that is, that it leaves to the States the power to make discriminations as to who shall vote. These discriminations may be on the score of either intelligence or want of property, or any other thing than the three things enumerated in his proposition.

* * *

"... the body of this [colored] race, made ignorant and destitute by our wrong, may substantially all be now excluded from the elective franchise under a qualification of intelligence or property or any other than the three named in the pending amendment, which qualification may be prescribed in the State laws, and is not prohibited by the gentleman's amendment. ... Let it remain possible, under our amendment, to still disfranchise the body of the colored race in the late rebel States and I tell you it will be done. ..."[9]

Shellabarger added:

"And, sir, can I be mistaken when I say that under the amendment of the gentleman from Massachusetts these 'mourners for the lost cause' can disfranchise the vast, overwhelming mass of the colored people of the entire South? Sir, it is impossible that I should be mistaken. The gentleman urges upon me as a reason why he prefers his amendment to the one I offer and prefer that mine would render the constitution of his own State unconstitutional, because Massachusetts requires that a voter shall be able to read; while his plan would leave it in the power of the States to continue and enforce an exclusion from the ballot because the man could not read. This position confesses the almost fatal defect of his plan. This colored race cannot now read because we have for these centuries shut them from the light; they are poor, because we have during these

> centuries stolen their property. And now we are about to make an amendment to our organic law . . . by which we say to the oppressing race, 'You may forever in the future, as you have in the past, keep away from these people both knowledge and property, by keeping away from them the ballot.' . . ."[10]

Congressman John A. Bingham, the Radical Republican from Ohio who had drafted the First Section of the Fourteenth Amendment, concurred completely in Shellabarger's argument that the Boutwell amendment would only cover discrimination based on race, color, or previous condition of slavery, and nothing else. Bingham declared:

> "Those three terms are the only terms of limitation in it, and hence it is manifestly true that this power remaining in the States, in no other manner fettered by the proposed amendment, may be exercised to the end that an aristocracy of property may be established, an aristocracy of intellect may be established, an aristocracy of sect may be established; in short, what has been done in New Hampshire in regard to official qualifications may be done in every State in this Union in regard both to the qualifications of electors and the qualifications of officers; that is to say, the States may set up a religious test, and pronounce at once that all who are not of the Protestant faith shall be disqualified either to vote or to hold office, and add thereto a property qualification and an educational qualification.
>
> "Hence, I believe, if we are going to touch this question by amendment we ought so to amend the proposition of the gentleman from Massachusetts [Mr. Boutwell] that the amendment presented to the people for their approval will inform them that upon its adoption these abuses by States will hereafter be impossible."[11]

Congressman Benjamin F. Butler, the colorful Massa-

chusetts pro-southern Democratic lawyer who had become a Union general and Radical Republican, came to the defense of Boutwell's amendment. He noted that Shellabarger's proposal and Bingham's proposal would "take away from the State any power whatever to make any educational or other test," because "You cannot put on any educational test, for that would be abridging the equal exercise of the elective franchise."[12] Butler also contended that these proposals would outlaw any state registration law because such a law would discriminate against people who had recently moved into the neighborhood. Butler urged that the House should adopt the Judiciary Committee's draft without alteration.[13] After Congressman William A. Pile, a Missouri Republican, noted that the main thing which should be done was to enfranchise Negroes, Boutwell remarked that the debate among the Republicans "demonstrated two facts: one is, there is a very general agreement that it is desirable to submit an amendment to the Constitution, and the other is, that there is a very great difference of opinion as to the details of the amendment."[14]

After hearing another speaker on Negro suffrage, Boutwell decided to make some modifications in the Judiciary Committee recommendation. He refused to accept the Bingham or Shellabarger proposals because they would endanger state registration laws and "abolish those qualifications in some States which require the voter to pay a small capitation tax. . . ." He feared that "by arraying against this proposition all the peculiarities of the different States we put the proposition itself in danger." But he was willing to ban property or educational qualifications, as being of a more serious and objectionable character.[15]

Bingham then objected that banning "property and educational qualifications recognizes the right in every State of establishing a religious test" because "every other thing not

included in this exception may be made a test. . . ." He deplored such a "piecemeal" way of amending the Constitution, and noted that "I stand here opposed to a proposition which on its face, in the words of Marshall, necessarily implies the consent of the House and of the country, if we adopt the amendment, that religious tests may be established as a condition of the exercise of the elective franchise." When Eldridge arose to underscore this point by inquiring whether Boutwell's altered proposal would not only allow states to impose "a religious test, but every test that the mind of man can conceive that does not come under the head of property or of education," Bingham reiterated his claim, and called for an amendment which would give Congress the power to enforce "equal exercise of the elective franchise," by a negative limitation on the states.[16]

Boutwell found Bingham's proposal too broad on pragmatic grounds. He became convinced that "if we should attempt to grasp at too much we shall lose the whole." Boutwell indicated his willingness to submit to the House an addition banning literacy and property qualifications for voting, but advised that each addition to the Judiciary Committee's draft dealing only with Negroes would pyramid opposition, thereby risking the whole proposition by increasing the difficulties of ratification in the state legislatures. To this Shellabarger answered that his amendment giving each person an equal right to vote would preserve state registration laws, but Boutwell differed with him and pointed out that a recent arrival could not be barred from voting under the proposal.[17]

The parting shot came from Congressman Thomas A. Jenckes, a Rhode Island Republican lawyer. He opposed another negative limitation on the states such as that contained in the committee draft or Bingham's amendment because it "makes the condition of suffrage primarily the

subject of legislation in the Legislatures or in the conventions of the States, and then throws the residuum which is declared beyond their power into Congress for settlement." He added that this would cause confusion which he preferred to be settled by affirmatively prescribing voting qualifications.[18]

Boutwell called for a vote, after hearing these conflicting proposals, first on the amendment to ban literacy test and property qualifications. Congressman James A. Garfield, an Ohio Republican lawyer and later President of the United States, declared that "I should be sorry to see . . . a prohibition placed in the Constitution" against "an educational test for suffrage." The amendment lost by a vote of 45 to 95, and its support was insufficient even for a roll-call vote.[19]

The next day, Congressman John M. Broomall, a Radical Republican from Pennsylvania, opposed suffrage "distinction of wealth, intelligence, race, family, or sex."[20] He exhorted the House to follow the proposed amendment by a women's suffrage provision.[21] Congressman Robert C. Schenck, an Ohio Republican lawyer and former professor, also described the Massachusetts English-language literacy test to the House in the course of describing the effect of Shellabarger's amendment.[22]

In closing the debate, Boutwell told the House:

> "the distinctions and differences of opinion which have been evolved by the debate in regard to the effect of the amendment proposed by the gentleman from Ohio afford to my mind conclusive evidence that if we submit the amendment in that form to the country we shall introduce in every State confusion, discord, and contention as to what the effect of the provision will be. But the amendment reported by the Judiciary Committee is directed against those distinctions which have been brought prominently before the country, and on

> which substantially public opinion, as entertained by the Republican party, has been expressed. We are safe if we stand upon the resolution reported by the committee; and, in my judgment, we are unsafe if we accept what we ourselves confessedly are unable to understand in such a way as to come to an agreement upon it."[23]

The House then voted down Shellabarger's proposal by 126 nay to 61 yea, and voted down Bingham's amendment by 160 nay to 24 yea.[24] It then passed the committee's proposal, which was to become the Fifteenth Amendment, by 150 yea to 42 nay.[25]

B. The Original Senate Version.

Debate in the Senate was opened upon the House resolution, as modified to add the right to hold office, by Senator Orris S. Ferry, a Connecticut Republican, who denied that the proposed amendment violated the Republican Party platform pledge of 1868, and asserted that the Democratic opposition based on the pledge was "higgling about estoppels and technicalities."[26] Shortly thereafter, Senator Willard Warner, a Republican from Alabama, moved to amend the joint resolution to give adult male citizens "an equal vote at all elections." He declared:

> "We eschew in our system of government all aristocracies, whether of birth, of wealth, or of learning . . . we profess to give to each individual an equal share of political power."[27]

Warner added:

> "The *animus* of this amendment is a desire to protect and enfranchise the colored citizens of the country; yet, under it and without any violation of its letter or

spirit, nine tenths of them might be prevented from voting and holding office by the requirement on the part of the States or of the United States of an intelligence or property qualification.

". . . You fail to protect the only classes of your citizens who need protection. Knowledge is power. Wealth is power. The learned and the rich scarcely need the ballot for their protection. . . . The millionaire in his money, and the man of education in his knowledge and his brain, have each a power in government greater than a hundred ballots, a power which the Constitution neither gives nor can take away. It is the poor, unlearned man, who has nothing but the ballot, to whom it is a priceless heritage, a protection, and a shield.

* * *

"While no man puts a higher estimation on the value of intelligence in the people than I do, and while no one would do more than I would to encourage the education of the masses, I repeat that it is the disfranchisement and oppression of the poor and the ignorant which it is our duty to guard against. In protecting the poor and the unlearned you are protecting the great laboring, industrial classes of the country."[28]

Senator Oliver P. Morton, an Indiana Republican, stated that although he would vote for the House draft, he was not satisfied with it because "this language admits or recognizes that the whole power over the question of suffrage is vested in the several States except as it shall be limited by this amendment. It tacitly concedes that the States may disfranchise the colored people or any other class of people for other reasons save and except those mentioned in the amendment." Morton mentioned various differing state qualifications, such as the Massachusetts literacy test, the Rhode Island property qualification, sundry residence requirements, and the special New York provision only allow-

ing Negroes owning $250 worth of property to vote. Morton advocated establishment by constitutional amendment of uniform standards for voting, warning:

> "This amendment leaves the whole power in the States just as it exists now, except that colored men shall not be disfranchised for the three reasons of race, color, or previous condition of slavery. They may be disfranchised for want of education or for want of intelligence. The States of Louisiana and Georgia may establish regulations upon the subject of suffrage that will cut out forty-nine out of every fifty colored men in those States from voting, and what may be done in one of these States may perhaps be done in others. They may, perhaps, require property or educational tests, and that would cut off the great majority of the colored men from voting in those States, and thus this amendment would be practically defeated in all those States where the great body of the colored people live. Sir, if the power should pass into the hands of the rebel population of these States—perhaps I should . . . rather call it the Conservative or Democratic population—if they could not debar the colored people of the right of suffrage in any other way they would do it by an educational or a property qualification."[29]

Moreover, Morton warned that the southern states could "dodge" the entire amendment by disenfranchising Negroes on the ground that "they are deficient in natural intelligence." But if the Senate would not go this far, Morton said that he preferred a proposal by Senator Jacob M. Howard, a Michigan Republican, giving citizens of African descent the same right to vote and hold office as other citizens, because at least that would be clearer, although "it still leaves the States the power of establishing an educational or proporty test by which they would cut off the great mass of colored men."[30]

Senator George H. Williams, a Republican lawyer from Oregon, proposed to give Congress complete control over voting qualifications.[31] He, too, warned that "any other conceivable ground [of disqualification for voting] would not contravene that amendment," and that the southern states would find it easy to evade. Williams added:

> "It is an old adage that 'where there is a will there is a way,' and I undertake to say that if this amendment which is proposed by the committee is adopted the white people of any State in this Union will possess the constitutional power to disfranchise colored citizens; and they will only have to put the act of disfranchisement upon some other ground than that of color or race."[32]

Williams not only wanted to protect Negroes, but also one white group against another. However, he urged his amendment also for the purpose of excluding the Chinese from the ballot, whose "political filth and moral pollution . . . are flowing with a fearfully increasing tide into our country from the shores of Asia."[33]

Senator Charles Sumner, the ultra-Radical Massachusetts Republican, followed next with a long declamation against racial restrictions on voting. He declared that "Nothing can be a 'qualification' [for voting] which is not in its nature attainable, as residence, property, education or character, each of which is within the possible reach of well-directed effort," and therefore color could not be a qualification for voting.[34] However, Senator George Vickers, a Maryland Democrat, in opposing any amendment, twitted Sumner about the Massachusetts literacy test.[35] Likewise, Senator James A. Bayard, a Delaware Democrat and an opponent of any amendment, noted that in a few States it was "made a prerequisite to the exercise

of the franchise that the voter shall be able to read the Constitution of the United States or of the State or some other paper, and to write his name." Bayard opposed this "educational franchise" for Delaware, but supported the right of a state to adopt it if the state chose to do so. Bayard pointed to various restrictions on voting, such as payment of taxes, residence, age, sex and race. He accused many of those favoring women's suffrage of being communists and socialists. He finally noted that the amendment would allow Chinese on the West Coast to vote, which inhabitants there opposed.[36] Senator Henry W. Corbett, an Oregon Republican who urged an amendment which excluded Chinese from the right to vote, also mentioned the literacy and property limitations on voting found in Massachusetts and New York.[37]

A few days later, Senator Frederick T. Frelinghuysen, a New Jersey Republican lawyer, urged the Judiciary Committee's amendment on the Senate. He declared:

> "It does not take away from the States the right to regulate. It leaves the States to declare in favor of or against female suffrage; to declare that a man shall vote when he is eighteen or when he is thirty-five; to declare that he shall not vote unless possessed of a freehold, or that he shall not vote unless he has an education and can read the Constitution. The whole question of suffrage, subject to the restriction that there shall be no discrimination on account of race, is left as it now is. . . ."[38]

Frelinghuysen opposed Williams' amendment "to take the regulation of suffrage from the States and give it to the General Government" because "I think suffrage is better where our fathers placed it. . . ."[39]

Senator Joseph S. Fowler, a Tennessee Republican law-

yer, urged universal manhood suffrage. He declared that the "proposition from the House to limit the constitutional amendment by the qualifications of race, color, or previous condition of servitude is a disgrace to the age. . . . I do not know who of the Judiciary Committee approved this piece of sublime stupidity."[40] On the other hand, Senator Jacob M. Howard, a Michigan Republican, wanted to make it even more clear that the amendment was meant exclusively for Negroes. He declared:

> "Again there arises from that peculiar form of expression, 'shall not be denied or abridged by the United States,' what, to my mind, is a very plain implication that in respect to other matters except race, color, or previous condition of servitude, the United States may, through its proper organs, if the Government shall see fit, abridge or deny to citizens of the United States in a State the right to vote or to hold office. For instance, the implication arises that for any other cause, whether it be religious belief, or a want of moral training, or defect of education, or whatever other test Congress may see fit to prescribe, the right to vote may be taken away from the citizen of the United States by act of Congress. Certainly I do not apprehend that the Committee on the Judiciary intended any such thing; but so plain to me is this implication that under such a clause Congress would have the right to deny or abridge the right of voting for some other causes than those mentioned in the article, that I certainly can never give that amendment my vote. . . ."[41]

The amendment of Senator Williams giving Congress complete control over suffrage was rejected by a vote of 38 to 6, on February 8th, 1869,[42] and that same day Senator Henry Wilson, a Massachusetts Republican and long a foe of literacy tests in his own state, offered an amendment banning discrimination in voting and office-holding based

not only on race and color, but also on nativity, property, education and creed.[43]

Shortly thereafter, Howard's amendment to confine the joint resolution to Negroes only was debated. Senator George F. Edmunds, a Vermont Republican, opposed this as not being based on any principle. But several senators supported it as hitting exactly what the Senate was against, especially three Pacific Coast Republicans who were anxious to keep the Chinese from voting.[44] When Edmunds objected to Howard's plan because it would leave the states free "to fix qualification of property, of intelligence, of religion, of landholding, of anything that may reduce a State government to an aristocracy," Williams asked him whether "the amendment reported by the committee does not leave the entire power in the hands of the States to provide any educational or property or other qualification that they see proper for voters." Edmunds replied: "Very likely it does under one construction, but it does not invite it."[45] He then went on to castigate Howard's amendment for its partiality to Negroes, concluding: "that it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendents of all nations, to impose upon them an amendment of that kind."[46] Warner chimed in to add that "I hope the Congress of this country will not single out one race for protection . . . I think to single out one race is unworthy of the country. . . ."[47]

Senator William M. Stewart, a Republican lawyer from Nevada who was in charge of the Judiciary Committee's resolution, asked Howard whether his amendment could not be evaded by a state requiring that all voters must own $10,000 worth of real estate. Williams interjected that "They could avoid one amendment as well as another," and Howard concurred.[48] Senator Frederick A. Sawyer, a South Carolina Republican, then raised the same point, as follows:

"MR. SAWYER. . . . If his amendment were adopted, would it not be competent for any of the States lately reconstructed, should they fall into the hands of our political opponents, to make such qualifications for suffrage, without violation of the terms of this amendment, as would practically disfranchise four fifths of the citizens of African descent?

"MR. HOWARD. . . . it is to be remembered, at the same time, that whatever regulation or restriction may be established in this regard by a State, it must operate with equal severity upon the white and the black races. I call his attention further to the fact that the amendment reported by the Judiciary Committee contains in itself precisely the same principle. The people of those States can do it now. As I said before, neither the joint resolution reported by the committee, now before us nor my amendment contemplates disturbing or meddling with, in any way, the right of the State to regulate the qualification of voters and officeholders further than concerns the people of African descent; putting all classes of both colors on precisely the same level."[49]

Senator James R. Doolittle, a conservative Republican turned Democrat and a "lame-duck" from Wisconsin, opposed any amendment. He wanted to leave the right to fix voting qualifications to the states even where he disagreed with them. He gave as examples the Rhode Island property qualifications and the New York requirement that Negroes own $250 of property to vote. He also noted:

"Massachusetts imposes another, to wit, that no person shall be permitted to vote unless he can read the Constitution of the United States in the English language. That substantially excludes every foreign-born citizen who does not read the English language. It excludes, as a matter of course, every Negro who cannot

> read the English language. If you were to apply the qualification which is required in Massachusetts in South Carolina today, under this amendment proposed by the Senator from Michigan, I suppose four fifths, if not nine tenths, of all the Negro population in South Carolina would be excluded."[50]

To this, Sumner suggested that a lot of white men would be excluded by a literacy test, but Doolittle replied that they might be willing to accept this.[51] After Doolittle's speech, Howard's amendment was defeated by a vote of 35 to 16.[52]

Senator John Sherman, an Ohio Republican, said that there were five main grounds for restricting the franchise, race, property, religion, nativity, and education, and he gave the Massachusetts literacy test as an example of the last. He wanted to ban all of these tests, but Senator Cornelius Cole, a California Republican, objected to eliminating nativity because of a desire to prevent the Chinese from voting. By an amendment similar to that of Shellabarger's rejected proposal in the House, Senator Willard Warner, an Alabama Republican, moved to give every male an "equal vote at all elections," but objections to this, too, were raised, that it conferred amnesty on disenfranchised rebels, and that it eliminated residence requirements. This amendment was also rejected.[53]

The next morning, the Senate took up Wilson's proposed amendment to ban discrimination in voting based on "race, color, nativity, property, education or religious belief." This was defeated by 24 to 19. An amendment by Fowler giving all male adults "an equal vote in all elections" was defeated by a vote of 35 to 9. Several other amendments were also rejected by the Senate.[54] Various senators advocated that the amendment be limited to citizens so as to prevent the Chinese from voting.[55]

Shortly thereafter, Wilson offered the same amendment

which had previously been defeated, with only verbal changes. Sherman supported it, pointing to the Rhode Island property qualification and the Massachusetts literacy test for voting, and the New Hampshire religious test for public office, as things that should be eliminated.[56] Other senators supported it in spite of the fact that it would allow Chinese to vote. Senator Simon Cameron, a Pennsylvania Republican, expressed his disgust because of the "egotism" of his colleagues. He noted: "Almost every Senator has a proposition of his own, drawn by himself, expressing his own views, and it seems to be thought that no one else can correct or improve it."[57]

Senator Oliver P. Morton, an Indiana Republican, strongly endorsed Wilson's amendment. He declared that restrictions on discrimination in suffrage should not be limited to race and color alone. He opposed property, religious, or nativity tests. He also declared:

> "I believe all educational tests in this country are humbugs. They do no good. When you come to consider the question of voting as a natural right, what right have you to take it from a man because he cannot read and write? He may be, nevertheless, a very intelligent man, and he has his rights to defend and preserve just like other men, and the right of suffrage is just as important to him as it is to anybody else. What right have you to say that he shall not have it because he cannot read and write?"[58]

However, Howard opposed Wilson's amendment. He wanted only a limited provision which would strike at racial discrimination in voting. He objected that "this amendment is entirely too sweeping; it runs a plow-share through all the State constitutions and overturns the most important State regulations that can be found. For my part I am not prepared to go so far as that."[59]

Senator James W. Patterson, a New Hampshire Republican, also arose to oppose Wilson's amendment. He declared:

> "I want no distinction of caste, or color, or property, but I have always been in favor of the law of Massachusetts. I have hitherto been in favor of an educational test as a restriction upon the right of suffrage; nor am I prepared to say now, as one gentleman has said, that this is an idle restriction . . . to retain an educational test in our constitution or in our law.
>
> * * *
>
> "But, sir, it is certainly true that self-government is not possible until a people have advanced somewhat in civilization; and it pre-supposes the maintenance of that intelligence by commerce and schools, by the press, and restrictions of law upon the influx of barbarism and arbitrary power from abroad. A restriction of that kind is no wrong done to the voter, for it simply protects the purity and integrity of the Government under which all his rights are secured. . . . an ignorant population have [no right] to complain of the restriction of intelligence which guards the political institutions under which they live. Why, sir, the voter discharging the obligation of an elector fulfills an official duty as truly as the judge exercises the functions of an office when he administers justice between man and man; and as some knowledge of law is a prerequisite in the judge to the proper discharge of his duties, so it would seem that some intelligence, some mental discipline, some little knowledge of the laws and spirit of a country is necessary to a safe participation in its government.
>
> * * *
>
> "I know that as we stand today an educational test may not be necessary; but it will do no harm. If the people have the intelligence prerequisite to self-government an educational test will not limit very much the

> extent of suffrage. . . . It is simply a safeguard against a possible evil. . . . to protect and guard it [suffrage] against the incoming floods of ignorance and barbarism is simply to preserve the jewel of liberty."[60]

Wilson then arose to answer Patterson. He declared that he had always been opposed to an educational test in his state, that it was almost of no value there, and that it kept no more than 500 men from voting. Patterson noted, in response to a question, that "if you retain the right to make an educational test it will apply to black men as well as to white men."

But his main concern was not with Negroes, but with Chinese and other foreigners. He did not agree with Wilson that such a test was "petty and ridiculous" because "there is a possibility of a number of these uneducated foreigners, who do not understand the spirit of our institutions, coming into any State so as to override the native citizens of that State."[61]

Senator Roscoe Conkling, a New York Republican, opposed Wilson's amendment because it would "revolutionize and undo the constitutions, the enactments, and the customs of the States." He deplored the abolition of educational qualifications for holding office. He added:

> "Education in any degree whatever, either as a qualification of suffrage or officeholding, a standard of intelligence above the most groveling and besotted ignorance is to be beyond and above the power, above the prerogative of the States. Sir, licentiousness is not liberty and excess is not wisdom. . . ."[62]

Sherman arose to reply to Conkling. He deplored restricting the proposed amendment "on so narrow a ground" as race and color alone "that we are constantly apologizing

for its weakness." He asked: "Why should we protect the descendant of the African, when in certain States of the Union a man who has the misfortune not to be able to read and write cannot vote?" He opposed limiting the constitutional amendment to this one disability, and urged striking down other limitations. Sherman wanted restrictions only based on age, residence, and sex. He observed that the Massachusetts literacy test was useless, and stated that unless these other limitations were abolished by the amendment, people in Ohio would object that there was no adequate reason for protecting Negroes when white citizens were excluded from voting in Massachusetts because they could not read and write, and others are excluded from office in New Hampshire because they were not Protestants.[63]

A vote was then taken on Wilson's amendment, and in almost a full Senate, it carried by the narrow margin of 31 to 27, with 8 absentees. The Republican majority was badly split on this issue. The tiny Democratic minority furnished only eight votes to the losing side, and one to the winning side.[64] Warner again raised his amendment granting "the equal exercise of the elective franchise," but this lost by 47 to 5.[65] Finally, after tacking on an amendment providing for the popular election of presidential electors, the Senate passed the joint resolution by a vote of 39 to 16.[66]

C. The Second Senate Version.

The Senate amendment banning literacy tests raised a storm of protests among Republicans throughout the country.[67] Boutwell recommended that the House of Representatives refuse to concur and ask for a conference committee, but Bingham moved to concur.[68] He approved of eliminating disqualifications "on account of color, on ac-

count of the accident of birth, on account of want of educational qualifications, on account of creed, and on account of want of property; and all these grievances are remedied and covered by this amendment. . . ."[69] However, the House refused to concur in the Senate amendment by a lop-sided vote of 133 to 37, and asked for a conference committee instead.[70]

In the Senate, Stewart, who had charge of the Judiciary Committee's resolution, moved that the Senate refuse to give way to the House and agree to a conference.[71] Senator Charles R. Buckalew, a Pennsylvania Democrat, warned that in conference "the House of Representatives always insists that its particular views shall prevail, and in nine cases out of ten the House has its way. . . ."[72] Morton warned that if the amendment were delayed beyond the session, ratification by the states would be endangered, and declared that "if I cannot get my choice, perhaps I will take something that I think is not quite so good."[73]

Stewart then withdrew his motion for a conference committee, and moved that the Senate recede from its position and adopt the House amendment.[74] Wilson objected. Although he said that "I generally govern myself by this practical rule: to get whatever good I can get and advance as far as I can today, hoping to be able to advance further tomorrow," he declared that he wanted the right to hold office given to Negroes. He stated that this could probably be obtained in conference, and that only if it could not would he agree to the House version as it stood.[75] Conkling said that he preferred the House version,[76] Stewart found it acceptable, and Morton was prepared to acquiesce, saying: "I am satisfied that we cannot obtain the Senate amendments, and therefore I am willing to take one that is not so good, in my opinion, rather than to have the whole

measure fail.'"[77] The Senate then moved to recede by a vote of 33 to 24.[78]

The question was then taken on agreeing to the House version. When Wilson complained that it had no provision in it protecting the right of Negroes to hold office, Stewart rebuked him for "loading that (amendment) down" with other prohibitions, and advised the Senate that further delays "will cause the loss of everything." Sherman added that the Senate was "tired of this question," and was prepared to accept the House version.[79] Howard also noted that "This does not satisfy me, but I take it because it is the best I can get at the present time."[80]

Sumner, however, protested. He said:

> "I think that in putting this great article into the Constitution we ought to be careful that it is complete in form and that it does meet all the exigencies of the occasion. Does this meet those exigencies? Is it complete in power? Is there a single Senator who is in favor of a constitutional amendment who will say that it is complete in form, or that it meets all the exigencies of the occasion? I believe there is not one Senator . . . who will affirm that it does. Now, sir, shall we, under the circumstances . . . be driven to adopt this imperfect proposition? I hope not."[81]

But Stewart told the Senate:

> "is he not willing to take the proposition which the House of Representatives sends to us, which accomplishes a great deal, rather than to take the risk of having our proposition again loaded down? . . . The only hope for getting anything is to vote for this proposition, . . . if you send it again and again to the other House, and it has to be sat out again and again, I tell you the session is too near a close to accomplish anything . . . because I cannot get everything I want now I

am not to reject what I can get. I am for taking what we can get now, . . .[82]

Sawyer did not see it that way. He told Stewart:

"I see no particular reason why the Congress of the United States should be in such a hurry about this. If the country has not come up to that condition of public sentiment yet which will enable it to adopt the principle of manhood suffrage, let us wait until the country is at that point. I am not obliged here, I do not feel bound here, to vote for an amendment to the Constitution which accomplishes nothing and under which any State may pass a law which shall disfranchise four fifths of the colored population without mentioning the word 'color'; and I do not hold myself ready to answer to the appeal which has been made by the distinguished Senator from Nevada to vote for this or we shall have nothing. I would rather have nothing than to have this; . . ."[83]

By this time, it had become quite obvious that the Senate majority was at war with itself. Senator William P. Fessenden, a Maine Republican, observed that "the Republican party, with a majority of more than two thirds in the Senate, cannot pass any measure or do anything, it is so cut up and divided, and there are so many opinions among the members composing it," if the Senate did not come to a vote at once. It did not do so.[84] In fact, by a vote of 32 to 24, it refused to reconsider the vote by which it receded from its amendments, and so divided were the Republicans that the tiny ten-man opposition delegation provided the balance of power. Moreover, although Frelinghuysen urged the Senate to adopt the House version, in spite of the fact that he preferred the Senate version, the vote on adoption stood 31 yea, 27 nay, less than the requisite two-thirds.

The result was that the Senate majority was so split that it was completely stymied.[85]

Stewart then moved to take up the original Senate Judiciary Committee draft. Senator James W. Nye, a Nevada Republican, opposed further work on the subject. He was clearly disgusted, saying:

> "when the House of Representatives present to us a constitutional amendment providing that negroes shall have the right to vote, I am surprised to see gentlemen who have labored for twenty years to get that provision into the Constitution, upon which more eloquence has been expended and more zeal displayed than upon all other questions that they have discussed, voting with the enemies of the proposition upon principle, for the mere purpose of gratifying their own whim. I am opposed to the further discussion of a measure upon which there is no possibility of agreeing. . . . I have no sort of belief that if we sat here until the 4th day of March at twelve o'clock there would be any constitutional amendment voted on that would be agreed upon by both Houses of Congress. If you adopt this proposition and send it to the House of Representatives they will send it back, and the two Houses will be playing shuttlecock with thte Constitution and its amendment, which is doomed to death in the end."[86]

But the Senate continued on considering the amendment. When Senator Adonijah S. Welch, a Florida Republican, insisted on including office-holding in the amendment, Howard replied that the amendment constituted an implied repeal of the constitutional provision forbidding religious tests for federal officers.[87] And Fowler said:

> "the propositions before us ignore the rights of all the white men of the country who are now divested of

this great right [to vote]. When this measure is adopted they will remain divested of the right by the States and by the Government of the United States. Why not rise up to the point that you will give to your own race a privilege or a right which you guaranty to another and an inferior race? . . . I contend that any amendment of the Constitution that does ignore the rights of the white men who are disfranchised throughout the United States is an amendment unworthy of the age. . . . Carry the proposition to the colored men in the Southern country and they will vote today to give this right to the disfranchised whites. They would spit upon such a proposition as this—a proposition in which their own rights are attempted to be secured, while it tramples down the rights of their own white fellow-citizens. . . . There is not a decent black man in all the Southern States who would not scorn such a proposition as this; and yet we are told . . . that nobody's rights are to be guarded except those who are marked by race, color, or previous condition of servitude, because these are specific qualities that are named and our attention is directed to them, and to them alone. For all other reasons a State may divest a man of his right to vote; for all other causes he may be deprived of this right; . . ."[88]

Senator Lyman Trumbull, an Illinois Republican lawyer, in the course of further discussion, said that it was not his understanding that the proposed amendment was designed "to give to the United States the regulation of suffrage . . . (but) to prohibit the States from denying" it. Senator George F. Edmunds, a Vermont Republican, stated that the prohibition against the United States was designed for the same reason in respect to the District of Columbia and the territories. To this Howard replied that "it is an irresistible inference from the very language we use" that Congress "may in any test that is not prohibited by this

article," restrict voting, such as "a religious test, an educational test, a property test." Howard also said that he differed with Edmunds, and believed that Congress would be given the power to prescribe the qualifications for officials by this amendment.[89]

After some more debate, Nye arose again to urge that the Senate pass the House version and be done with the subject. He suggested:

> "Does it not go far enough? If it does not, let us take what we can get. Long ago did I learn the lesson that it was better to hold that which we could obtain than to lose all by grasping for too much."[90]

Wilson answered Nye by justifying his amendment, but noted that when it "was so decisively rejected by the Representatives of the people I regretfully but readily abandoned it." He added: "The time is not perhaps ripe for its adoption; but if the spirit of a refining, elevating, Christian civilization shall continue to advance the time will come when the ctizens of the United States will not be restricted in their civil and political rights and privileges by the race to which they belong, the color of their skin, the place where they were born, the property they may possess, the education they may have acquired, or their religious belief."[90]

Next, Howard offered the amendment that the Senate had previously voted down, namely: "Citizens of the United States of African descent shall have the same right to vote and to hold office in the States and Territories as other citizens." When asked by Edmunds why it was limited only to Negroes, Howard replied that there was no complaint that anyone else was being denied the right to vote. He suggested that the Senate come right out and say what it

meant.[92] However, once again Howard's amendment lost, this time by a vote of 27 to 22, with ten negative Democratic votes holding the balance of power in the closely divided majority."[93]

Upon a motion to reconsider, Senator Roscoe Conkling, a New York Republican lawyer, urged the adoption of Howard's amendment on the grounds that the committee draft could be easily evaded. He noted:

> "in substance it is that no citizen shall be excluded from the right to vote or hold office on account of race, color, or previous condition of servitude. Upon the interpretation of everybody a man may be excluded for any other reason, may he not? Let us see what other obvious reasons, if they exist, would exclude the very class of which we are speaking."[94]

He gave as an example a voting restriction based on the fact that the slave parents of Negro freemen were never legally married, or that they were sons of slaves. However Edmunds and Stewart indicated that the House Draft would cover this type of evasion. Conkling then added that "in addition to the modes which I suggest, . . . I could point out a number of other modes in which it would require but slight ingenuity to circumvent this proposed amendment." Edmunds and Stewart retorted that Howard's amendment could be equally evaded, and the latter gave as an illustration the fact that if all males of illegitimate birth were barred from voting, more Negroes than whites would be excluded.[95] Indeed, Howard himself indirectly supported this view, when he declared:

> "The effect of it . . . is simply to subject the African race to the same restrictions and qualifications that prevail as to every other class of citizens within the

> state. Of course they would be subjected to an additional qualification if the State saw fit to make one, or to a property qualification, or any other qualification the State might see fit to apply, except the qualification of race and color."[96]

Howard's amendment lost on reconsideration by a vote of 29 to 16. The vote was then taken on the Judiciary Committee draft, and it carried by 35 to 11, with almost all of the regular Republicans present supporting it.[97]

D. The Conference Report.

When the Senate substitute came before the House, Bingham moved to tack on a modified form of the Wilson amendment in that body. Boutwell reminded Bingham that the House had twice rejected similar provisions.[98] Shellabarger also asked leave to offer his original amendment, slightly modified, giving all male citizens "an equal vote at all elections."[99] In support of his proposal, Bingham said:

> "Why, equality of the law is the very rock of American institutions, and the reason why I desire to amend this proposition of the Senate is that as it stands it sweeps away that rock of defense by providing only against State usurpation in favor of colored citizens, to the neglect of equal protection of white citizens. While colored citizens are equal in rights with every other class of citizens before the majesty of American law, as that law stands written this day, I am unwilling to set them above every other class of citizens in America by amending the Constitution exclusively in their interest. The import of my amendment is to protect all classes alike, and I ask a vote upon it.
>
> ". . . But that all citizens, native-born and naturalized, black and white, may be equal, so far as political rights

> are concerned, under the operation of the Federal Constitution, I ask leave of this House to insert the additional words 'nativity, property, creed.' . . . If my amendment shall be adopted you will strike down as well the constitutions of other States, as for example the State of Rhode Island, which wrongfully and unjustly discriminates this day by property qualifications against naturalized citizens of the United States as compared with native-born citizens, . . . I would have inserted the other word 'education,' but I know that the general sense of the American people is so much for education, that chief defense of nations, that if they will not take care of that interest they will take care of nothing."[100]

A vote was thereafter taken on Bingham's amendment, and it carried by 92 to 70. Shellabarger then withdrew his proposed amendment, and the House proceeded to pass the joint resolution by a vote of 140 to 37.[101]

However, the Senate disagreed with the House version, and the measure went to conference.[102] The result of the conference report was an amendment in the terms of the present Fifteenth Amendment. The right to hold office was struck out, as was any limitation except that based on race, color, or previous condition of servitude.[103] The conference committee had come back full circle to the original, very limited House Judiciary Committee draft.[104] This the House approved by a vote of 145 to 44 without debate.[105]

The Senate was clearly in a quandary. Many senators were unhappy with the change, but the conference report was not taken up until February 26, 1869, and the session and Fortieth Congress was due to expire on March 3rd. There was not enough time left to rework the entire proposition between the two houses. If the amendment was not passed, it would have to be taken up by the Forty-First

Congress. There was some doubt that, with increased Democratic representation in the House of Representatives, a two-thirds majority could be found there to pass an amendment in the new Congress.[106] Moreover, Negro suffrage was not popular in many key northern states, and the Republicans had every good reason to fear that if the amendment was postponed, by the time it reached the states Democratic legislatures hostile to the amendment would be elected replacing the Republican legislatures elected on Grant's "coat-tails," and the amendment would not be ratified.[107] Indeed, the Republicans had resisted every effort by the minority to have the amendment submitted to legislatures or conventions chosen after it was proposed, so fearful were they of popular rejection.[108] The dominant party was thus faced with a choice of accepting an unpalatable conference report or taking the risk of postponing the whole matter, thus jeopardizing ratification.

Senator Samuel C. Pomeroy, a Kansas Radical Republican, was the first to protest, but Stewart, one of the conference members, defended his compromise.[109] Howard added:

> "I shall vote to concur in the report not because this amendment of the Constitution as presented is entirely satisfactory to me, but because I think that it is at present the best that can be obtained. I must content myself, therefore, with the best I can get and run the risk of the future. . . . It will be observed from the language of the report now before us that it does not confer upon the colored man the right to vote. I wish it did; . . . This, however, confers no right to vote. It declares that 'the right of citizens of the United States to vote shall not be denied or abridged,' etc., without imparting the right itself."[110]

Edmunds, a dissenting member of the conference committee, also vigorously castigated the report, but said that he would not vote against it.[111] Wilson lamented the loss of his amendment which "covered the white man and prohibited distinctions on account of nativity, property, education, or creed." He added:

> "If the black man in this country is made equal with the white man—and I hope he soon will be—I mean, by the blessing of God, while I live to hope on and to work on to make every white man equal to every other white man. I believe in equality among citizens—equality in the broadest and most comprehensive democratic sense. No man should have rights depending on the accidents of life."[112]

But Wilson added:

> "I have asked always for what was right and taken on all occasions what I could get. I have acted upon the idea that one step taken in the right direction made the next step easier to be taken. I suppose, sir, I must act upon that idea now; and I do so with more sincere regret than ever and with some degree of mortification. . . . I am going to vote for this proposition without taking any responsibility for it. I am not responsible for this half-way proposition. I simply take it at this late hour as the best I can get after having struggled for the right to vote and the right to hold office. . . . If there is an opportunity to get the right to hold office I will do it; I take no risk, for I am determined to take what I can get if I cannot get all I demand."[113]

Morton was also dissatisfied. He seemed content that the House had struck out the ban on literacy tests, but strongly favored banning discrimination based on nativity, property, or religion in voting qualifications. However, he declared:

> "I shall probably vote for this report made by the committee of conference, because I think I cannot do any better, for the reason that the time within which to act is so short. Time is important, and I am afraid if this matter is referred to another committee of conference the resolution may be lost altogether. I go upon the principle of taking half a loaf when I cannot get a whole one; . . . I may be compelled to take this proposition just as it is because at this late hour of the session if I do not take it I may not get anything; . . . As I said before, my position is peculiar. I will take what I can get and even be thankful for that."[114]

Sawyer was also clearly unhappy with the measure. After sharply criticizing it, he concluded: "If I vote for this proposition, . . . I do it with great reluctance, I do it with great hesitation, and I do it because I am advised that we must have something, and that this is the best we can get."[115] But Stewart answered him by decrying the position "that if you cannot have it right do not have it at all," and the following colloquy occurred:

> "MR. STEWART. . . . Every Senator must see that there is not time for further action.
>
> "MR. FRELINGHUYSEN. And no chance at the next session.
>
> "MR. STEWART. And no chance at the next session? Your Legislatures are waiting now, ready to act. Send it to another conference and the whole thing is lost.
>
> "MR. FRELINGHUYSEN. There will be no chance at the next session, because there will not be a two-thirds vote there for it.
>
> "MR. STEWART. And there must be two thirds in the other House. . . ."[116]

The Senate then recessed, and when debate resumed that evening, Buckalew observed that his prediction that the House of Representatives usually wins in conference had proved accurate.[117] Senator Justin S. Morrill, a Vermont Republican, arose to note that only four working days remained in the session, and that there was much other legislation to be acted on. He therefore observed: "From my knowledge of the state of business in each House I am prepared to believe that we must accept the report of this committee or abandon all hope of any amendment of the Constitution being proposed by this Congress. I would much prefer some different amendment from this. . . ."[118]

Senator Henry B. Anthony, a Rhode Island Republican, spoke next. He indicated satisfaction with the amendment because it did not alter Rhode Island's property qualifications for voting, and noted that if an amendment had been submitted which had done so, the Rhode Island legislature would not have ratified it. He added: "we have the satisfaction of knowing that without our State the necessary number of twenty-eight States cannot be obtained for ratification of any amendment whatever until new elections take place." Anthony got into something of a tiff with Wilson and told him that Rhode Island "takes the responsibility of managing her own affairs in her own way" even if "we fail to satisfy our friends in Massachusetts in our management of our internal affairs. . . ."[119]

Warner offered the last lamentation. He mourned:

> "I want respectfully but earnestly to enter my humble protest against the character of this amendment. While I shall probably vote for it in the shape it is, I shall do it rather in deference to the judgment of older and wiser men than myself than in accordance with my deliberate judgment."[120]

The Senate then voted on the conference report. Thirty-nine Republicans voted for it; and two regular Republicans plus eleven Democrats and conservatives voted against it. With a two-thirds majority finally obtained, the amendment carried.[121]

E. Subsequent Debate

The effect of the Fifteenth Amendment on literacy tests also arose during debate in the Forty-First Congress on enforcement legislation.[122] Congressman Richard J. Haldeman, a Pennsylvania Democrat, noted the fact that in spite of this amendment, the "States may still deny the right of suffrage . . . [for] want of property qualification, or want of education, or for wanting a period of residence sufficiently long to satisfy the State Legislature. . . ."[123] Congressman Benjamin F. Butler, a Massachusetts Republican lawyer who had voted for the Fifteenth Amendment, noted that the Massachusetts literacy test was "the stock denunciation against Massachusetts. . . ."[124]

In the Senate, Howard of Michigan continued his lamentation over how ineffectual the Fifteenth Amendment was, and the following colloquy with Stewart of Nevada, who had shepherded this amendment to passage, occurred:

> "Mr. Howard. . . . if it be the disposition of the people of Virginia to amend their constitution in such a manner as to ostracise and to exclude from the right of suffrage the colored population, in my humble judgment, the fifteenth amendment of the Constitution is of very little value, if of any at all. . . . So far as a State Legislature or a State convention should trench upon the rule expressed in the fifteenth amendment relating to race, color, and previous condition of servitude, and to those subjects only, its legislation would be void, and Congress could interfere under the second

clause of the amendment to correct that legislation. To that I agree; but suppose the State affixes as a qualification of a voter the necessity of being the owner of, say, two hundred dollars' worth of property. Suppose the State should alter its constitution so as to require from the colored man the posession of his own right of two hundred dollars' worth of property, which is the old rule in the State of New York, does the Senator from Nevada hold it to be in the power of Congress to alter in any way by congressional enactment that qualification of the State? No, sir. Why not? Because the qualification does not relate to color, race, or slavery, but only to property, the subjects being as distinct from each other as the sun is from the moon. No, sir; Congress in such a case as that would have no authority whatever to interfere to correct the evil. We should be bound by the constitutional amendment itself; we should be tied up to those three specific subjects—race, color, and servitude—and we could make no inquiry beyond those particulars.

"MR. STEWART. A law of that kind would necessarily be general, would it not? If applied in that form, making a property qualification, it would have to be general and apply to whites as well as blacks? . . .

* * *

"MR. HOWARD. . . . Suppose the State of Virginia passes a general act or inserts a general clause in its constitution requiring that every voter shall possess in his own right property to the amount of $200, or any other specific sum, will he undertake to deny that under that clause of the Constitution, the fifteenth amendment, it would be competent for Virginia or any other State to enact such a provision? Certainly not. He must admit it. Well, sir, how many colored people in Virginia would be allowed to vote under such a restriction? Not one out of a hundred, I undertake to say, and hardly one out of a thousand. . . . Now, does the Constitution anywhere say, does even the fifteenth

amendment, which is the Senator's great panacea, say that a State shall not impose restrictions upon the right of suffrage? No sir; there is nothing of the kind in the Constitution, nothing of the kind in the fifteenth amendment except that no distinction shall be made in cases in which color, race or slavery is involved. That is the sum total of that amendment. The State of Virginia . . . can by her Legislature, . . . propose such an amendment to her local constitution as shall in effect disfranchise nine hundred and ninety-nine out of a thousand of the colored population of that State, by imposing a property qualification upon them, and it would be no violation of the fifteenth amendment.

"MR. STEWART. . . . We do not want the admission of the Senator from Michigan; it may come up in debate hereafter. Does he think she can pass any law or make any device whereby ninety-nine hundredths of the black population can be disfranchised? Would it not be in violation of the Constitution, so as to give Congress the power to interfere?

"MR. HOWARD. I know no clause in the Constitution of which it would be a violation. The States have exercised the power of controlling, regulating, and restricting popular suffrage from the commencement of the State governments down to the present time. It is one of the rights reserved to the States, and is to be exercised in its fullness and in its plentitude without any control on the part of Congress or any question being put by Congress to them; and that will be the case until the fifteenth amendment shall have been adopted, that amendment relating only to color, race, and slavery, not to property, not to educational qualifications, or anything except these three specific subjects. Now, sir, it will be the easiest thing in the world, were the Legislature of Virginia disposed to do so, to launch at once an amendment which would strike out of the hands of the colored men in that old Commonwealth the right to vote, and it would affect very few

> white people, . . . Sir, I insist that as to the black population this fifteenth amendment is of very little value if the State sees fit to take away the right of suffrage by affixing property qualifications or educational qualifications, or any qualifications whatever that do not relate to race, color, or slavery."[125]

Moreover, Senator Lyman Trumbull, an Illinois Republican lawyer who had voted for the Fifteenth Amendment, told the Senate:

> "Now, under the Constitution as amended . . . by the adoption of the fifteenth amendment, Congress has no control over the question of suffrage further than to prevent the States from discriminating on account of race or color; but any State may require a property qualification, may require an educational test, may impose such conditions upon voting as it thinks proper, so they are uniform on all classes of citizens. That power has not been taken away from the States. The only power that has been taken away from them is the authority to discriminate on account of race, color, or previous condition."[126]

But Senator Richard Yates, an Illinois ultra-Radical Republican, continued to denounce the Massachusetts literacy test aimed at foreigners and the New York property qualification for voting in some general declamation.[127]

Shortly thereafter, Senators Oliver P. Morton of Indiana and George F. Edmunds of Vermont, both Republican lawyers who had actively participated in the debate on, and voted for, the Fifteenth Amendment, got into the following colloquy:

> "MR. MORTON: . . . the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suf-

frage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.

* * *

". . . But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?

"MR. EDMONDS. Nobody, I think, would claim that we have. I should not say so."[128]

In accord with the foregoing views are those of Senator William T. Hamilton, a Maryland Democratic lawyer, who observed that the Fifteenth Amendment "does not confer upon Congress any power to establish the qualifications of electors in the States." Hamilton also noted that aside from the explicit prohibitions, "in all other respects the several States have within themselves . . . the full and perfect power to fix the qualifications of electors."[129] In replying to him, Senator Carl Schurz, a Missouri Republican, engaged in a long, generalized oration on the values of universal suffrage free from "arbitrary exclusions," but noted that "an educational test . . . will not affect the principle."[130]

During some debate, Senator Eugene Casserly, a California Democratic lawyer and a former Corporation Counsel of New York City, noted: "Except as to that class of citizens and causes, the [fifteenth] amendment leaves the whole subject of suffrage, including qualifications of voters, in the control of the States as fully as it had been for nearly eighty years before the amendment was thought of."[131]

Likewise, Senator Garrett Davis, a Kentucky Democratic lawyer who had participated in the debates on the Fourteenth and Fifteenth Amendments as an opponent of both, observed:

> "If the State of Kentucky was to pass a general property qualification law for voters, applicable to all whites and to all freedmen, it would be perfectly competent for that State to pass such a law, and it would not come under the inhibition or proscription of this fifteenth amendment, because the interdiction of the power of the State Legislator to act upon the subject of suffrage has application only to disqualifications on account of race, color, or previous condition. Of course any other qualification of suffrage, embracing that of Massachusetts, that a voter shall be able to read before he is entitled to vote, or that he shall have paid his taxes, State, national, and municipal, before he is entitled to vote, and shall have received a certificate of the payment; or the qualification of the State of Rhode Island, that a man who is a foreigner by birth shall have a certain amount in value of real estate before he is entitled to vote, would not touch the prohibition which the fifteenth amendment puts upon the power of Congress or upon the power of any State Legislature."[132]

Senator Joseph S. Fowler, a Tennessee Republican lawyer who had opposed the Fifteenth Amendment because it was too narrow, in again criticizing it noted:

> "The article, in its first section, is a mere prohibition upon the United States and the States, and a prohibition that protects three characteristics or conditions. There is here no grant of power to the General Government. . . . While it protects race it ignores sex, property, intelligence, virtue, service, religion, profession, etc."[133]

Congressman Michael Kerr, an Indiana Democratic lawyer, who had voted against the Fourteenth and Fifteenth Amendments, made this observation about the latter:

> "It does not confer the right to vote. It only forbids the denial by the States or by Congress of the right to vote on account of race, color, or previous condition of servitude. But the right itself must be derived from and enjoyed in accordance with the laws of the States. Its regulation pertains to them alone. This amendment does not say they may not deny or abridge suffrage at their pleasure, but only that they shall not do so 'on account of race, color, or previous condition of servitude.' For all other causes, applicable alike to citizens of all colors, races, and conditions, the powers of the States are as plenary as they were before the pretended ratification of the amendment."[134]

Kerr also noted that nine-tenths of the Negroes in the Southern States could be disenfranhcised if these states instituted the Massachusetts English language literacy test "without any infringement of either the letter or spirit of the fourteenth and fifteenth amendments."[135] Moreover, Congressman John A. Bingham of Ohio, the Radical Republican lawyer who had drafted the First Section of the Fourteenth Amendment, noted that to be protected under the bill enforcing the Fifteenth Amendment, a citizen must "otherwise [have] the qualifications required by such State of voters."[136] Indeed, even persons of foreign birth can be discriminated against by the states, because the House was told that the word "nativity" was struck out by the conference committee from the proposed draft of the Fifteenth Amendment to allow the West Coast states to exclude the Chinese from voting there.[137]

During debate in the Third Session of the Forty-First Congress, on a bill to enforce the right to vote, Bingham,

who had proposed a ban on literacy and property qualifications in the Fifteenth Amendment without success, was asked about the Massachusetts literacy test and the Rhode Island property qualification for voting and replied that the "State prescribes the qualifications of the electors. . . ."[138] Likewise, Senator George Vickers, a Maryland Democratic lawyer who had participated in the debates on the Fifteenth Amendment and voted against it, observed:

> "The fifteenth amendment comes in as a proviso or addendum to the power originally reserved to the States, and says that in fixing the qualifications for voters the States must not discriminate among the people on account of race, color, or previous condition of servitude. The States have the constitutional power today to prescribe any condition to the right to vote, except as to race or color and former condition of the person. They may prescribe as qualifications for voters . . . education, and define the branches and extent of it; also a property qualification; also that a voter shall have been a citizen of the State for five, ten, or any number of years. . . . Age and residence are completely in their province to declare. . . . It will be seen that the primary and essential power is in the States. . . . But the only restriction upon a State is that by her legislation she shall not deny this privilege of franchise on account of race, color, or previous condition of servitude. She may virtually deny it, by prescribing educational or property qualification, or residence or citizenship for a period of time, or any other; except that of race or color."[139]

The Rhode Island property qualification also came up again. In response to a question by Senator Henry B. Anthony, a Republican from that state, Senator Thomas F. Bayard, a Delaware Democratic lawyer who, like

Anthony, had participated in the debates on the Fifteenth Amendment, remarked that the state discriminated against naturalized citizens by requiring them to own real property to vote, and "that LaFayette could have lived there till now, and if he happened to be poor and had not the requisite amount of property he could never have voted under the constitution of Rhode Island; and no Act of Congress could have enabled him to vote there."[140] Likewise, Senator Francis P. Blair, a Missouri lawyer who changed from Republican congressman to Democrat to become the unsuccessful vice-presidential candidate in 1868, noted:

> "There is but one State in this Union, . . . that makes any discrimination by its laws now against any of its citizens in the matter of suffrage; and when this fifteenth amendment was under consideration the Senators and Representatives from that State showed a marked jealousy in regard to it. It is the State of Rhode Island, which by law prohibits any foreign-born citizen from voting unless he is the owner of a certain quantity of land; and there is not land enough in the State for any large number of people to be the owners of. [Laughter] . . . This fact was well known to the Senate, well known to the members of the House, well known to the people of the whole country, and was a subject of discussion in this Chamber at the time the fifteenth amendment was acted on."[141]

Thereafter, debate on literacy tests and the Fifteenth Amendment becomes scanty. In the First Session of the Forty-Second Congress there is a passing reference to the fact that of the 63 members of the South Carolina legislature, 50 were Negroes, of whom 28 were completely illiterate and 14 more could not write their names.[142] In the next session, Senator James Harlan, an Iowa Republican lawyer and a former university president who had voted for

the Fifteenth Amendment, decried educational qualifications for voting or holding office, saying: "in my opinion the success of free government does not depend on scholastic attainments."[143] During the Forty-Third Congress, Congressman John O. C. Atkins, a Tennesse Democratic lawyer, told the House:

> "The State of Massachusetts has an educational qualification, and any black man resting under that educational disability, or white man either, cannot vote. Hence you see that the State, except the single limitation imposed by the fifteenth amendment that suffrage shall not be withheld on account of race, color, or previous condition of servitude, has supreme control over this great bulwark of liberty, the elective franchise—even the power to prescribe the qualifications of voters is not asserted, for Congress by the terms of this amendment—its power is only negative—it confers no power, but simply imposes an impediment or limitation for certain causes upon the powers of the State in the all-important right of suffrage. Suffrage, then, the boon of an American citizen, is not derived from the Federal Government, but is essentially a right granted and controlled by the State."[144]

During the same session, mention was made in the Senate of the Rhode Island property qualification.[145]

A little later in the session, Morton had occasion to comment on the effect of the Fifteenth Amendment with some fullness. He declared:

> "The fifteenth amendment does not provide that any colored man shall have the right to vote; it makes no such provision, but it says that no man shall be denied the right of suffrage because of his color. In other words, the States may still prescribe a property qualification on the right of suffrage, the States may say

that no man shall have the right to vote unless he has five hundred dollars' worth of property, or that no man shall have the right to vote unless he is twenty-five years of age, or, as they do in Massachusetts, that no man shall have the right to vote unless he can read and write. The States may still say that; but these conditions must be made applicable to men of all colors. There is the point.

"What the fifteenth amendment says is that the conditions or restrictions upon suffrage, whatever they may be, must be equally applicable to all races. The State of North Carolina has a right now to provide in her constitution that no man shall have the right to vote unless he has $1,000 worth of property, but it cannot confine that to the colored race or the white race; it must be equally applicable to all. In other words, whatever may be the conditions of suffrage, either liberal or illiberal, it must not be made to depend upon color, and that is the whole of the fifteenth amendment."[146]

Senator Eli Saulsbury, a Delaware Democratic lawyer, also made considerable reference to the Massachusetts and Connecticut literacy tests for voters, and the Rhode Island property qualification which discriminated against foreign born citizens.[147] Senator Augustus S. Merrimon, a North Carolina Democrat and a former state judge, noted that the Fifteenth Amendment only forbade discrimination in the three causes set forth therein. He further observed:

"But notwithstanding that inhibition, it is perfectly competent for any state to have a provision in its constitution providing that no person shall vote unless he can read or write. Indeed, in some of the States anyone who cannot read is prohibited from voting."[148]

Merrimon also declared during the next session:

> "The several States cannot prohibit anybody from voting for any one of three reasons, . . . but for any other reason or cause they may prohibit a person from voting. They may prohibit men from voting because they cannot read, because they cannot write, because they do not own so much property. In some of the States today those who cannot read and write are not allowed to vote; and I believe in one State of the Union there is a property qualification. At any rate these distinctions are kept up; and the only point of view in which the States are restricted as to their control over the right of suffrage is the one contained in the fifteenth amendment, that men shall not be prohibited from voting on account of race, color, or previous condition of servitude. But with this exception, this limitation, the power that the States exercised before the adoption of this amendment remains there to this day. . . ."[149]

This was all the debate during the reconstruction period.

F. Summary and Conclusions.

The question of the extent to which the Fifteenth Amendment restricts the right of the states to prescribe literacy tests for voting, is not difficult to ascertain. The legislative history, indeed, is singularly free from ambiguity.

Literacy tests were well known at the time of the proposal by Congress of the Fifteenth Amendment. An attempt was made to forbid them, in part on the ground that southern states would use them as a device to reduce Negro voting. The attempt was originally successful in the Senate, but ultimately failed for a variety of political reasons. Such failure of the attempt to ban state literacy tests means that states are constitutionally at liberty to exercise their pre-

existing power to require literacy tests of voters of such a kind as they may choose, in such language as they may deem desirable, with such a degree of difficulty as they may care to impose, all in their uncontrollable discretion, as long as they do not require such tests of members of one race and omit them as to members of another. The states may abolish, institute, or alter such literacy tests at any time for any reason whatsoever which seems to them to be sufficient, and so long as these tests are applied at that particular time to members of all races, no violation of the Fifteenth Amendment is committed; no one's rights are violated; and hence any attempt by Congress to interfere with such literacy tests is not an enforcement of the Fifteenth Amendment permitted by the Second Section thereof, but is an act in excess of the constitutional power which the states have surrendered to the federal government, and is *ultra vires*, and void.

FOOTNOTES

[1] Congressional Globe, 40th Cong., 3rd Sess., p. 9 (1868); *id.* at pp. 286, 542 (1869). Citations to the Congressional Globe or Record will hereafter be made by Congress, session, page, and date. For example, the foregoing citation would read: 40 (3) Globe 9 (1868); 40 (3) Globe 286, 542 (1869).

[2] 40 (3) Globe 638-9.

[3] 40 (3) Globe 645, 673, 904, 1012, 1314-5, 1633, App. 167.

[4] 40 (3) Globe 668.

[5] 40 (3) Globe 706.

[6] 40 (3) Globe 707-8.

[7] 40 (3) Globe 708.

[8] 40 (3) Globe 710.

[9] 40 (3) Globe App. 97. See also *id.* at 652 (Cong. Shelby M. Cullom), 724 (Cong. Hamilton Ward).

[10] 40 (3) Globe App. 98. Congressman William Higby, a California Republican lawyer said: "The opponents of this measure cannot with truth assert that power is to be centralized by . . . [the amendment] since power is not given but taken away from both Federal and State governments; but the power to control the elective franchise for other conditions than those named in the proposed amendment is allowed to repose where it now rests." (40 (3) Cong. Globe App. 294).

[11] 40 (3) Globe 722.

[12] 40 (3) Globe 724.

[13] 40 (3) Globe 725.

[14] *Ibid.*

[15] 40 (3) Globe 726.

[16] 40 (3) Globe 726-7. Bingham's proposal read: "No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States of sound mind and twenty-one years of age or upward the equal exercise of the elective franchise. . . ." *Id.* at 722.

[17] 40 (3) Globe 727.

[18] 40 (3) Globe 728.

[19] *Ibid.* See also *id.* at 743:

"MR. SHELLABARGER. And the provision suggested yesterday in relation to qualifications grounded on intelligence, etc., are now out of the case?

"MR. BOUTWELL: They were voted down yesterday by the House two to one."

[20] 40 (3) Globe App. 102.

[21] 40 (3) Globe App. 103.

[22] 40 (3) Globe 743.

[23] 40 (3) Globe 744.

[24] *Ibid.*

[25] 40 (3) Globe 745.
[26] 40 (3) Globe 855.
[27] 40 (3) Globe 861.
[28] 40 (3) Globe 862.
[29] 40 (3) Globe 863.
[30] *Ibid.*
[31] 40 (3) Globe 899.
[32] 40 (3) Globe 900.
[33] 40 (3) Globe 900-1.
[34] 40 (3) Globe 902.
[35] 40 (3) Globe 907, 909.
[36] 40 (3) Globe App. 168-9. See the reference to literacy tests in 40 (3) Globe 1440.
[37] 40 (3) Globe 939. See also *id.* at 984.
[38] 40(3) Globe 979.
[39] *Ibid.*
[40] 40 (3) Globe App. 199. See also 40 (3) Globe 1638.
[41] 40 (3) Globe 985. See also *id.* at 999: "I will not vote directly or by implication authority to prescribe any such test as that of religious creed, education, property, or anything else. . . ."
[42] *Ibid.*
[43] 40 (3) Globe App. 154. See also 40 (3) Globe 1009, 1014.
[44] 40 (3) Globe 1008.
[45] 40 (3) Globe 1009.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] 40 (3) Globe 1010.
[50] 40 (3) Globe 1011.
[51] *Ibid.*
[52] 40 (3) Globe 1012.
[53] 40 (3) Globe 1013.
[54] 40 (3) Globe 1029.
[55] 40 (3) Globe 1030-1, 1033-5.
[56] 40 (3) Globe 1035.
[57] 40 (3) Globe 1036.
[58] 40 (3) Globe 1037.
[59] *Ibid.*
[60] *Ibid.*
[61] 40 (3) Globe 1038.
[62] *Ibid.*
[63] 40 (3) Globe 1039.
[64] 40 (3) Globe 1040.
[65] 40 (3) Globe 1041.
[66] 40 (3) Globe 1044.

[67] Mathews, "Legislative and Judicial History of the Fifteenth Amendment," 27 Johns Hopkins Univ. Studies in Historical & Political Science 11 [305] 34 [328] (1909), citing editorials in New York Times, Feb. 15, 1869; The Nation, Feb. 18, 1869, p. 126; Harper's Weekly, Feb. 27, 1869, p. 131; and Wendell Phillips in Anti-Slavery Standard, Feb. 20, 1869.

[68] 40 (3) Globe 1224.

[69] 40 (3) Globe 1225.

[70] 40 (3) Globe 1226.

[71] 40 (3) Globe 1284.

[72] 40 (3) Globe 1285.

[73] 40 (3) Globe 1287.

[74] 40 (3) Globe 1289.

[75] 40 (3) Globe 1291. See also *id.* at 1298 (Sen. Joseph C. Abbott R.—N. C.)

[76] *Ibid.*

[77] 40 (3) Globe 1292.

[78] 40 (3) Globe 1295.

[79] 40 (3) Globe 1296.

[80] 40 (3) Globe 1297.

[81] 40 (3) Globe 1298.

[82] 40 (3) Globe 1298-9.

[83] 40 (3) Globe 1299.

[84] 40 (3) Globe 1300.

[85] *Ibid.*

[86] 40 (3) Globe 1300-1.

[87] 40(3) Globe 1301.

[88] 40 (3) Globe 1304. Fowler also said: "the Government of the United States may limit his right to vote on all other grounds . . . this mention of certain limitations which may not be placed upon his rights . . . [gives] the Congress of the United States the clear right to limit them in other respects. It is clearly an acknowledgement that the Government may do that thing." Id. at 1307-8.

[89] 40 (3) Globe 1304-5.

[90] 40 (3) Globe 1306.

[91] 40 (3) Globe 1307.

[92] 40 (3) Globe 1308. See also *id.* at 1309.

[93] 40 (3) Globe 1311.

[94] 40 (3) Globe 1316.

[95] *Ibid.* See also *id.* at 1317.

[96] 40 (3) Globe 1317.

[97] 40 (3) Globe 1318.

[98] 40 (3) Globe 1425.

[99] 40 (3) Globe 1426.

[100] 40 (3) Globe 1427.

[101] 40 (3) Globe 1428.
[102] 40 (3) Globe 1466, 1470, 1481, 1495.
[103] 40 (3) Globe 1563.
[104] 40 (3) Globe 726.
[105] 40 (3) Globe 1564.
[106] 40 (3) Globe 1629-1631. The Republican delegation in the Forty-First Congress was 149; the Democratic delegation was 63. U. S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).
[107] See 40 (2) Globe 40, 49, 50 (1867); 40 (2) Globe 466, 1065, 1963 (1868); 40 (3) Globe 1309, 1311, 1633 App. 167 (1869). See also 41 (3) Globe 1250-2 (1871).
[108] 40 (3) Globe 671-4, 707, 711, 912-3, 1040-1, 1311-5, 1425, 1633 App. 206.
[109] 40 (3) Globe 1623-5.
[110] 40 (3) Globe 1625.
[111] 40 (3) Globe 1625-6.
[112] 40 (3) Globe 1626.
[113] *Ibid.* See also *id.* at 1627: "If I cannot get all, I will take a part . . . I cannot take the responsibility of defeating this amendment. . . ."
[114] 40 (3) Globe 1627-8. See also *id.* at 1632, 1640.
[115] 40 (3) Globe 1629.
[116] *Ibid.*
[117] 40 (3) Globe 1639. See n. 72, *supra.*
[118] 40 (3) Globe 1639.
[119] 40 (3) Globe 1640.
[120] 40 (3) Globe 1641.
[121] *Ibid.*
[122] Enforcement Act of 1871, 16 Stat. 140, ch. 114, Force Act of 1871, 16 Stat. 433, ch. 99. See also the Ku Klux Klan Act of 1871, 17 Stat. 13, ch. 22.
[123] 41 (2) Globe 40 (1869).
[124] 41 (2) Globe 291. And note the petition to Congress by Massachusetts citizens protesting literacy tests there. *Id.* at 1337. For a discussion of the dangers of an illiterate electorate, see *id.* at 765-6, 1493.
[125] 41 (2) Globe 599-600 (1870).
[126] 41 (2) Globe 1363.
[127] 41 (2) Globe 3336.
[128] 41 (2) 3571.
[129] 41 (2) Globe App. 353.
[130] 41 (2) Globe 3609.
[131] 41 (2) Globe App. 472. He also said: "There was in the country another large class of persons, of the white race, natives of Europe, who though declared to be 'citizens' of the United States by the

fourteenth amendment, had been or were still denied . . . 'the right to vote' in one or more States, and might be in all, on account of nativity or the want of a property qualification, or both. By the peculiar working of the fifteenth amendment all this class was and is excluded from its benefits."

[132] 41 (2) Globe 3667. See also *id.* at 3804, referring to Rhode Island voting restrictions.

[133] 41 (2) Globe App. 421.

[134] 41 (2) Globe 3872.

[135] 41 (2) Globe 3875. See also mention of a literacy test in 41 (2) Globe App. 433.

[136] 41 (2) Globe 3883.

[137] 41 (2) Globe 4275, 4278.

[138] 41 (3) Globe 1284 (1871).

[139] 41 (3) Globe 1635.

[140] 41 (3) Globe App. 162.

[141] 41 (3) Globe App. 158.

[142] 42 (1) Globe App. 160 (1871).

[143] 42 (2) Globe 878-9 (1872).

[144] 43 (1) Record 454 (1874). See also H.R. Rep. No. 22, 41st Cong., 3rd Sess. 1 (1871); S. Rep. No. 21, 42nd Cong. 2nd Sess. 1, 4-5 (1872).

[145] 43 (1) Record 950.

[146] 43 (1) Record App. 360.

[147] 43 (1) Record 4161.

[148] 43 (1) Record App. 314. See also 43 (2) Record 944 (1875).

[149] 43 (2) Record 1796 (1875).

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia as *amicus curiae* in the above-captioned matter, hereby certify that copies of the Appendix to the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae,* have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of December, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Daniel R. McLeod, Esq., Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina, and David W. Robinson, Esq. and David W. Robinson, II, Esq., Special Counsel, P. O. Box 1942, Columbia, South Carolina, counsel for plaintiff State of South Carolina; and upon Nicholas deB. Katzenbach, Esq., Attorney General of the United States, and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, defendant and counsel for defendant respectively.

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Assistant Attorney General

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No. 22 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

vs.

NICHOLAS deB. KATZENBACH, Attorney General of the United States,
Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI, AMICUS CURIAE

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No. 22 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

vs.

NICHOLAS deB. KATZENBACH, Attorney General of the United States,
Defendant.

BRIEF FOR THE STATE OF MISSISSIPPI, AMICUS CURIAE

AUTHORITY FOR THE FILING OF AMICUS CURIAE BRIEF

The Court's order of November 5, 1965, in this cause permits the filing of this brief.[1]

1. See also Rule 42 (2) and (4), Rules of the Supreme Court of the United States.

INTEREST OF THE AMICUS

The State of Mississippi became the 20th member of the Union in the year 1817 when it was "*admitted on an equal footing with the original states in all respects whatever.*"[2] There is now pending in the United States District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3312, styled "United States of America, Plaintiff, v. The State of Mississippi et al., Defendants", wherein the constitutionality of the Voting Rights Act of 1965, Public Law 89-110, is precisely drawn in issue as to its application to and effect upon the new statutes of the State of Mississippi relating to qualifications required of electors which are set out in Appendix A hereto. This district court action directly and not abstractly raises questions of constitutionality both included within and in addition to those raised by the South Carolina case. Both the sovereignty and equality of the State of Mississippi could be affected by an improper decision of the cause pending here.

REQUEST FOR PERMISSION TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to leave granted in the Court's said order of November 5, 1965, request is hereby made to the Clerk of this Court that the State of Mississippi, as *Amicus Curiae*, be allowed to participate in the oral argument of this cause on January 17, 1965, or as soon thereafter as the State may be heard.

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2. Act of Admission, December 10, 1817, 3 Stat. (L. & B. Ed.) 472. See also Enabling Act of March 1, 1817, 3 Stat. (L. & B. Ed.) 348. The Act of Admission contained a finding that the requirement of the Enabling Act for the establishment of a republican form of government had been met.

SUMMARY OF ARGUMENT

Discussions of the Voting Rights Act of 1965 in the Congress were based on a false premise. The Constitution of the United States grants no powers to the State Governments. That document and its Amendments create a central government of limited enumerated powers, none of which powers grant or include authority to affirmatively establish qualifications for electors in the various states.

The provision of the Voting Rights Act purporting to "suspend" the rights of selected states to use a literacy qualification for voting is particularly unconstitutional in the light of the history of the adoption of the 15th Amendment. That history discloses that the 40th Congress which proposed the 15th Amendment expressly debated the inclusion of prohibitions against education, property and religious tests but finally determined to include only prohibitions against race, color or previous condition of servitude. The history of all provisions of the original Constitution and the other Amendments likewise discloses a complete lack of support for this Act.

The only new right which the 15th Amendment conferred was the right of male citizens to vote if they met State qualifications which did not deny or abridge the right to vote on account of race. Every republican form of government withholds the right of franchise from some portion of its constituents on the basis of its own ideas of proper qualifications; and all courts have long affirmed that the Constitution does not confer suffrage on anyone. In America, voter qualifications have always been based upon the laws of the separate States. The *privilege* of suffrage becomes a *right* to vote only when a citizen comes within the limits of the privilege as defined by State legislation.

The central government can have no legitimate concern with "enlarging representative government" or with "increasing democracy" because, under our Constitution, Congress is not empowered to create or require any particular combination of qualifications for the electors of any State or all of them. When literacy requirements are plain and reasonable and equate with the bare mechanical ability to mark a ballot and comprehend election notices and voting instructions, such requirements cannot discriminate on account of race or color. Such a requirement is so clearly not conflicting with or repugnant to the command of the 15th Amendment that Congress cannot constitutionally create a repugnance by its attempts to legislate "enforcement."

There is a gross anomaly in this legislation. The Voting Rights Act was aimed at correcting *misadministration*. Congress conceded that they were dealing with voting standards which did not, on their face, discriminate on account of race. Therefore when Congress essayed to destroy such laws in some States on the basis that it was the easy, convenient way to stop occasions of misuse in certain counties and parishes, it erred. It was patently improper to despoil South Carolina's requirement that her voters possess marginal literacy, since her "conviction" was based on the allegations of misadministration of *other* laws in *other* States.

There is no such thing as suspended sovereignty. If the power to suspend exists it can be exercised to suspend for 100 years as easily as for five. It can suspend the entire range of qualifications as easily as it can suspend one. Insofar as South Carolina's sovereignty is concerned, there is no difference between the power to suspend and the power to destroy her voter laws.

If a statute be valid and non-discriminatory by its plain terms, it cannot be destroyed or rewritten by an administration which misuses it nor can it be debilitated by Congress' looking beneath the surface of the law in an attempt to divine some improper legislative motive. In order for a statute, which is within a State's power to enact, to be invalid, it must have the *inevitable* effect of operating discriminatorily or it must vest *arbitrary power* in administrative officials. Laws which are capable of a fair, even application and have the effect of operating equally may be vehicles of discrimination in the hands of evil men but, in such cases, correction must work on the men not the statute. This is not to say that misadministration cannot give rise to a constitutional claim of denial of equal protection of law, it is only to state that misadministration can never make a bad statute good nor can it make a good statute bad.

In enacting the Voting Rights Act, Congress exercised purely judicial functions of investigating past facts, making legislative findings of past guilt and then passing a fiat to enforce liabilities on certain states. Such an *advocate-judge* type of function amounts to a legislative trial and is a bill of attainder. The States attained under this act are inflicted with deprivations of their unqualified rights to use valid, constitutional laws and to make reasonable changes in their voter requirements for a five-year period while other states, both with and without past histories of discrimination, are permitted to use and enforce identical laws. Such principles of legislation have recently been condemned by this Court in the field of regulation of Communist activities. *The Constitution is no less available to and protective of the sovereign State of South Carolina than it is to the Communist Party.*

Although the act purports to use a formula to determine its coverage, the "formula" is a *subterfuge* to cover

the fact that Congress was legislating against selected states that were frequently named in its discussions and were arbitrarily chosen for legislative adjudication. The "formula" looks exclusively to the past so that it will not in the future accidentally catch any States other than those singled out for punishment now. The "formula" does not define a standard of conduct that bears a reasonable relationship to proving the claimed wrongdoing, rather, it defines only the States and counties which have been selected.

As drawn, the act clearly violates the right of South Carolina and every other state to *equal footing* as respects political standing and sovereignty within the Union.

Congress exceeded the limits of the Constitution in enacting the Voting Rights Act of 1965.

ARGUMENT

I.

By the Constitution, the People of the Several States Created a Central Government of Limited, Enumerated Powers.

A recurrence to fundamentals is an apt beginning because throughout committee proceedings and debates Congress discussed the constitutional issues raised by this legislation in terms, on the one hand, of its power to legislate under the 15th Amendment and, on the other hand, what was referred to as the power "*granted*" to the states to fix voter qualifications under Article I, Sections 2 and 4, and under the first section of the 17th Amendment. The fallacy of this very basic premise is obvious.

Practically since the Ninth and Tenth Amendments of the Bill of Rights made it explicit, this Court's opinions have repeatedly pointed out that our federalism is not built upon

a central government possessing general powers, surrounded by satellite states occupying subservient governmental roles. *There are no powers granted to the States by the Constitution.* The Court's own words negate the congressional premise and best illustrate the true structure of the United States.

> "... (After the adoption of the Constitution) the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." Per Story, Justice, speaking in *Martin* v. *Hunter's Lessee*.[3]

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states and of compounding the American people into one common mass. . . . From these (State) conventions the Constitution (of the United States) derives its whole authority. . . . This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." Per Marshall, Chief Justice, speaking in *McCulloch* v. *Maryland*.[4]

> "The General Government has no powers but such as are given to it expressly or by implication.

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3. 14 U.S. (1 Wheat.) 304, 325, 4 L.Ed. 97.

4. 17 U.S. (4 Wheat.) 316, 403, 405 and 423, 4 L.Ed. 579.

"The States and their Legislatures have all such as have not been surrendered or prohibited to them." Per Swayne, Justice, speaking in *Hale* v. *Wisconsin*.[5]

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced." Per McReynolds, Justice, speaking in *Linder* v. *United States*.[6]

". . . Though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.

"The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle cannot justify attempted exercise of a power clearly beyond the true purpose of the grant." Per Roberts, Justice, speaking in *Railroad Retirement Bd.* v. *Alton Railroad Co.*[7]

"It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative

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5. 103 U.S. 5, 11, 26 L.Ed. 302.

6. 268 U.S. 5, 17, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229.

7. 295 U.S. 330, 346, 347, 55 S.Ct. 758, 79 L.Ed. 1468.

action, and thus gives a permanence and stability to popular government which otherwise would be lacking." Per Brewer, Justice, speaking in *Muller* v. *Oregon*.[8]

The 15th and 19th Amendments prohibit denial or abridgement of the right to vote on account of race and sex. The 24th Amendment proscribes poll and other tax prerequisites in Federal elections. Congress is given the power to enforce these prohibitions. Article I, Section 4, gives Congress permission to make or alter regulations prescribing the times, places and manner of holding elections for Federal Congressmen. Except for the reduction of representation clause of the 14th Amendment, the Constitution of the United States is otherwise silent as to Congressional power to control the elector qualification and voting processes of the several States. Therefore, under proper constitutional precepts the remaining plenary powers belong to the States to fix and change qualifications of electors and to prescribe reasonable procedures and regulations to prevent corrupt practices in voter registration and elections, subject only to the general judicial protections of the Constitution applicable to all State action in the execution and enforcement of its statutory and decisional policies.

The Founding Fathers undertook to establish a constitutional republic and explicitly required that each State be guaranteed a republican form of government. The persuasions urged upon Congress to assume to extend suffrage to citizens of selected states, contrary to the laws of those states, were urgings to create a government of men and not of laws, and outside of the limits of the Federal Constitution. In respondent to these urgings by enacting the Voting Rights Act of 1965, Congress exceeded its constitutional powers.

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8. 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957.

II.

The Fifteenth Amendment Does Not Vest Authority in Congress to "Suspend" State Literacy Qualifications.

A.

"Suspension" of the State Literacy Qualifications for Voting Is Not APPROPRIATE under the Fifteenth Amendment in the Light of the Legislative History of That Amendment, Which Discloses That the Fortieth Congress Considered at Length, But Refused to Include in the Amendment, a Prohibition of Literacy Qualifications.

This Court has long adhered to the practice of interpreting provisions of the Constitution in the light of the conditions existing at the time of their enactment.[9] Records of the debates in the Constitutional Convention and contemporary writings, such as The Federalist papers, are often quoted in support of interpretations of the original document. It is equally appropriate to refer to the debates in Congress and ratifying state legislatures to ascertain the true intent and meaning of the several amendments.[10]

There was certainly no thought of authorizing Congressional setting of voter qualifications in the original Constitution. Not even the leading exponent of centralization, Alexander Hamilton, dared to propose federal regulation of State voter qualification. It was Hamilton who

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9. See, e.g., *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 9 L.Ed. 1233; *Maxwell* v. *Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597; *Ex parte Grossman*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 31; *U. S.* v. *Barnett*, 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23.

10. For a thoroughly documented discussion of the original constitution's history in the field of voting qualifications for Federal elections, see the 1962 Weaver Constitutional Law Essay Winner; Ritz, "Free Elections and the Power of Congress Over Voter Qualification"; 49 ABA Journal 949.

proposed that the Constitution be so framed as to give the Central Government power to appoint the Chief Executive of each state, whose appointment would extend during good behavior and who would be vested with the power of absolute veto over any acts of the State legislature. But when it came to the creation of Federal electors, Hamilton wrote:

> "Suppose an article be introduced into the Constitution empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments?"[11]

The portions of the Voting Rights Act which are involved in this proceeding depend solely on the 15th Amendment for their constitutional foundation.[12]

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11. Federalist No. 59, Madison Edition, p. 279.

12. See, e.g., in Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 89th Congress, H.R. 6400, Ser. No. 2:

> "Mr. Katzenbach: As drafted this is based *entirely* on the legislative provision of the 15th amendment which empowers Congress to enact legislation in order to effectuate the substantive prohibitions against discrimination on the ground of race or color." (p. 50)

See, also, pp. 12-19 in the House Hearings; House of Representatives, Report No. 439, 89th Congress, 1st Session, pp. 16-19; Hearings before Committee on the Judiciary, United States Senate, 89th Congress, S. 1564, Part 1:

> This legislation has only one aim—to effectuate at long last the promise of the 15th amendment—that there shall be no discrimination on account of race or color with respect to the right to vote. That is the only purpose of the proposed bill. It is therefore, truly legislation "designed to enforce" the amendment. (p. 20)

> "Senator Ervin: Under this bill the literacy test that applies to the Puerto Ricans in New York would still remain in full force and effect, unaffected, and the literacy test in 34 counties of North Carolina would be outlawed, is that not so?

The legislative history of the proposal of the 15th Amendment makes it transparant that Congress intended by the amendment to forbid *only* the denial or abridgement of the right to vote on account of race, color or previous condition of servitude. Both branches expressly considered and extensively debated making the proposal into a sweeping constitutional veto of state voter qualifications based upon educational, property and religious tests, in addition to race; but after the House refused to concur in a narrowly passed Senate proposal to this effect, the amendment was proposed to the States in its present form. Rather than lengthen this brief, we refer to the outstanding thorough and copiously documented treatise on this subject which is the appendix to the brief filed in this proceeding by the Commonwealth of Virginia, *Amicus Curiae*.

Although we submit that the 14th Amendment was not intended to furnish any base for the portions of the Voting Rights Act which are presented by South Carolina's complaint, and that it could not validly furnish any such base if it had been put forward, we would also respectfully refer the Court to Part I B of the dissent of Mr. Justice

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Attorney General Katzenbach: That is right, Senator because this is based on the 15th amendment. And I do not believe that that situation in New York could be cured under the 15th amendment." (p. 75).

Later, the Puerto Rican provision was added [Section 4 (e)] as was a poll tax provision [Section 10], but neither are involved here.

Hereinafter, for sake of brevity, these records will be referred to as House Hearings, House Report, and Senate Hearings, respectively. To the same effect is United States Senate Report No. 162, Part 3, 89th Congress, 1st Session, pp. 1, 17. See also the Brief filed by the United States in Original Nos. 23, 24 and 25, October Term, 1965, p. 17.

Emphasis in all quotations is added except where otherwise indicated.

Harlan in *Reynolds* v. *Simms*,[13] in which he demonstrates by quotations from the debates of the 39th Congress and references to the various state ratifying actions that the 14th Amendment was in nowise intended to cover *the affirmative fixing of qualifications for electors.* Especially do we assert that the 14th Amendment does not bar the use by any state of a literacy requirement so reasonable that it requires no more than that electors possess the naked manual ability to place the mark they intend upon a ballot.[14] The only relationship the 14th Amendment bears to suffrage is the same which it bears to all types of classifications; namely, it proscribes arbitrary devices and formulae which deny equal protection of law, such as that condemned in *Carrington* v. *Rash*.[15]

If the 14th Amendment were ever to be distorted into authority for *Congress* to demand that all states have the same federally established or approved elector qualifications, the Union of the Constitution would be dead. A greater opportunity to create a self-perpetuating oligarchy could not be envisioned than to give to Congress the power to designate the qualifications of those who could vote them into office. The very fact that the 15th Amendment was adopted recognizes what Section 2 of the 14th Amendment implies, and that is that before the adoption of the 15th Amendment a state could constitutionally limit the franchise to Caucasians.[16]

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13. 377 U.S. 533, 595, 84 S.Ct. 1362, 12 L.Ed.2d 506.

14. History of the 39th Congress which proposed the 14th Amendment shows that that same Congress chose to impose a literacy test on all *new* voters in the District of Columbia, the bulk of whom were Negroes. It further shows that the District bill had the support of most of those who supported the proposal of the 14th Amendment and that the bill was passed over the veto of the then President Johnson. (See Volume 39 of the *Congressional Globe*.)

15. ..... U.S. ....., 85 S.Ct. 775, 13 L.Ed.2d 675.

16. *U. S.* v. *Reese et al.*, 92 U.S. (2 Otto) 214, 23 L.Ed. 563.

The States themselves, in the times of the adoption of the Fourteenth and Fifteenth Amendments, certainly did not evidence any opinion that the Fourteenth Amendment operated to enfranchise Negro citizens. In fact, just the opposite appears. At least sixteen States *outside the Confederacy* restricted the franchise to Caucasians (and in some cases, to Indians). Most of them continued this pattern of racially restricted suffrage after the ratification of the Fourteenth Amendment.[17]

This suit presents a direct confrontation between the Constitution and the Voting Rights Act. Both cannot stand;

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17. *Oregon*-Constitution of 1857 Art. II, Sec. 2; Chapter XIII, Code of Civ. Proc. (1863). Remained in organic law until self-executing provisions of the 15th Amendment took effect. See, *Wood* v. *Fitzgerald*, 3 Or. 568, 580, and *McKay* v. *Campbell*, Infra, Page 19.

Nevada-Original Constitution, Art. II, Sec. 1, not amended until the ratification of Art. XVII in 1880. See Sec. 207, Cutting's Compiled Laws of Nevada 1861-1900.

Kansas-Constitution of 1859, Art. V, Sec. 1. See *Anthony* v. *Halderman*, Infra, Page 19 and cf. *Hunt* v. *Richards*, (1868) 4 Kan. 549.

Michigan-Constitution of 1850, Art. VII, Sec. 1, not amended until ratification of amendment in 1870. Howell's Anno. Statutes of 1882, P. 55.

Illinois-Constitution of 1847, Art. VI, Sec. 1 not amended until ratification of amendment July 2, 1870. Starr and Curtis Anno. Statutes of 1885, P. 99.

Connecticut-Constitution of 1818, as amended in 1845, Art. VIII of amendments, after one unsuccessful attempt in 1869 to enfranchise Negroes the Legislature deleted the word "white" from the Constitution in 1874. Laws of 1874, P. 132.

Ohio-Constitution of 1851, Art. V, Sec. 1, Severe provisions enforcing exclusively white suffrage were adopted on April 16, 1868, Swan & Saylor Code 1868, P. 336-9. May 7, 1869, the Legislature rejected the 15th Amendment reciting that the people of Ohio had recently rejected "Negro suffrage" by a majority of over 50,000 votes. Laws of 1869, P. 424.

Indiana-Constitution of 1851, Art. II, Secs. 2 and 5 not amended until after July 1, 1870. See Davis Supplement to Gavin & Hard Code.

one must fall. To permit the Voting Rights Act to stand will result in sanctioning: (1) that which was rejected by the draftsmen of the Constitution of the United States, (2) that which would have prevented the adoption of that Constitution by the States which did adopt it, and (3) that which the 39th and 40th Congresses refused to include in the prohibitions of either the Fourteenth or the Fifteenth Amendments.

If neither the original document, nor the 14th, nor the 15th Amendment were designed or intended to proscribe State adoption of a fair, reasonable literacy requirement as a qualification for electors, *a fortiori* the action of Congress in adopting the Voting Rights Act in a form which "suspends" just such a qualification in South Carolina and leaves it in use and available for use in other states is without semblance of constitutional support.

B

The New Right Which the 15th Amendment Conferred upon Male Citizens Was the Right to Vote IN ACCORDANCE WITH STATE LAW, Free from Denial or Abridgement on Account of Race.

Although the Fifteenth Amendment has been referred to as creating universal male suffrage, only a moment's reflection is necessary to determine that such a characterization is wholly inaccurate. Some States extend suffrage to 18 year olds, others require the attainment of 21 years of age. Residence requirements, sanity requirements, character requirements, literacy requirements, poll tax requirements, temporary and permanent registration procedures and provisions of corrupt practice acts, all serve to reduce suffrage in varying degrees and to differing extents in the several States. None allows *all* males or *all* citizens the right of the ballot. Almost 100 years ago in

the debates on the 14th Amendment this same thought was expressed on the Senate floor, thus:

> "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government.
>
> "*Notwithstanding this, no State or community professing to be republican allows all its people to vote.* Every one fixes for itself some rule which, in its judgment, will furnish a body of voters or electors who will most wisely and safely represent the wishes and interests of the whole people. The right or franchise of voting has, probably, been more widely extended in these American States than in any other professed republican Government, but in the most liberal of these it has always been confined to a small minority of the whole people. In none of our States have females, or males under twenty-one years of age, ever been allowed to vote.
>
> "*The truth is that the whole system of suffrage of any republican State is wholly artificial, founded upon its own ideas of the number and class of persons who will best represent the wishes and interests of the whole people.*"[18]

The numerous "voting" cases decided by this Court, from *Minor* v. *Happersett*[19] to *McPherson* v. *Blacker*[20] to the *Carrington* case[21] will obviously be extensively discussed by the principal litigants.

The *amicus* feels that it would be of more interest to the Court to supply in this brief a ready reference to the reasoning of other courts which have dealt with this sub-

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18. 39 Congressional Globe (June 5, 1866), p. 2962.
19. 88 U.S. (21 Wall.) 162, 22 L.Ed. 627.
20. 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869.
21. Footnote 15, supra, p. 13.

ject reasonably near to the time of the adoption of the 15th Amendment.

In *McKay* v. *Campbell*,[22] the Court reasoned:

> "The fifteenth amendment above quoted, declares in effect that citizens of the United States and of the several states shall vote in their respective states at all elections by the people, without distinction on account of race, color or previous condition of servitude. But the amendment does not take away the power of the several states to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any state may deny the right of suffrage to citizens of the United States, on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several states where they reside, without the distinction of race, color or previous condition of servitude."

The Kansas Constitution contained the following article on franchise:

> "Every *white* male person, of twenty-one years and upwards, belonging to either of the following classes, who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector."

On the claim of one denied the ballot, the Kansas Supreme Court wrote:

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22. (D.C. Or., 1870) 16 Fed.Cas. 157, 160, Case #8839.

"The object and effect of the Fifteenth Amendment to the Federal Constitution were to place the colored man in the matter of suffrage on the same basis with the white. It does not give him the right to vote independent of the restrictions and qualifications, such as age and residence, imposed by the State Constitution upon the white man. The colored man, to become a voter, as well as the white man, must be twenty-one years of age, six months a resident of the State, and thirty days a resident of the township or ward. *That amendment operates no further than to strike the word 'white' from the State Constitution.*"[23]

In *U. S.* v. *Amsden*,[24] it was succinctly stated:

"The right to vote in the states comes from the states, while only the right of exemption from discrimination comes from the United States."

The Supreme Court of Alabama in a well documented opinion in *Washington* v. *State*,[25] expressed the following views:

"It may be laid down as a sound proposition, using the language of Mr. Cooley, that 'participation in the elective franchise is a *privilege* rather than a *right*, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible, consistent with the public safety.'—Cooley's Con. Lim. (5th Ed.) 752 (*599). Mr. Story, without undertaking to say whether it has its foundation in natural right or not, says it 'has always been treated in the practice of nations as a strictly *civil* right, derived from and regulated by each society according to its own free will and pleasure.'—1 Story's Const. (4th Ed.) §§ 579-582. The weight of both reason and of authority, however, as we shall see, sup-

23. *Anthony* v. *Halderman*, (1871) 7 Kan. 50, 60.

24. 6 F. 819 (D.C. Ind. 1881).

25. (1884) 75 Ala. 582, 584, 51 Am.Rep. 479.

port the view that political suffrage is not an absolute or natural right, but is a privilege conventionally conferred upon the citizen by the sovereignty. There can be practically no such thing as universal suffrage, and it is believed that no such theory is recognized among any people. Some are necessarily excluded on the ground of infancy, and the privilege is infinitely varied among others, either upon the ground of public policy, or for reasons that seem arbitrary. No one can lawfully vote under any government of laws except those who are expressly authorized by law. It is well settled, therefore, under our form of government, that the right is one conferred by constitutions and statutes, and is the subject of exclusive regulation by the State, limited only by the provisions of the Fifteenth Amendment to the Federal Constitution, which prohibits any discrimination on account of 'race, color, or previous condition of servitude.'—Cooley's Cons. Lim. (5th Ed.) 752 *et seq.;* McCreary on Elec. (2d Ed.) § 3; Brightley's Elec. Cases, 27; *Huber* v. *Reiley,* 53 Penn. St. 112. The States having the power to confer or to withhold the right, in such manner as the people may deem best for their welfare, it necessarily follows that they may confer it upon such conditions or qualifications as they may see fit, subject only to the limitation above mentioned." (Emphasis by the Court).

The Supreme Court of Massachusetts in *Stone* v. *Smith,*[26] put the rule thus:

"Article 14 of the amendments of the constitution of the United States (section 2) provides that, 'when the right to vote at any election, * * * is denied to any of the male inhabitants of such states, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other cause, the basis of representation therein shall be reduced in the proportion

26. (1893) 159 Mass. 413, 34 N.E. 521.

which the number of such citizens shall bear to the whole number of such citizens, twenty-one years of age, in such state.' This distinctly recognizes the right of a state to deny or abridge the right to vote of the male inhabitants who are 21 years of age, and it is well known that many of the states have, from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right. Article 15 of the amendments of the constitution of the United States provides that 'the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.' This is the only prohibition on the states contained in the constitution of the United States which concerns the right to vote."

In *U. S.* v. *Miller*,[27] it was stated:

"It is manifest that no power is conferred on Congress by the second section to enact legislation for the regulation and control of elections generally, nor for securing to the citizens of the United States the right to vote at all elections. The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right, like the right to life, liberty, and the pursuit of happiness. Unless restrained by constitutional limitation, the legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others. Before the adoption of the fifteenth amendment, it was within the power of the state to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however, arbitrary or whimsical. The constitution of the United States, before the adoption of the fifteenth amendment, in no wise interfered

27. 107 F. 913 (D.C. Ind. 1901).

with this absolute power of the state to control the right of suffrage in accordance with its own views of expediency or propriety. It simply secured the right to vote for members of congress to a definite class of voters of the state, consisting of those who were eligible to vote for members of the most numerous branch of the state legislature. Further than this, no power was given by the constitution, before the adoption of the fifteenth amendment, to secure the right of suffrage to any one. The fifteenth amendment does not in direct terms confer the right of suffrage upon any one. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the states still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency.

* * *

"As we have said, this section is bottomed solely on the fifteenth amendment. It cannot be successfully contended that the amendment confers authority to impose penalties for every conceivable wrongful deprivation of the colored man's right to vote. It is only when the wrongful deprivation is on account of race, color, or previous condition of servitude that congress may interfere and provide for its punishment. If, therefore, the section in question goes beyond that limit, it is unauthorized by the amendment."

In *Karem* v. *United States*,[28] that Circuit held:

"The Fifteenth amendment is therefore a limitation upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is neces-

28. 121 F. 250 (CCA 6th, 1903).

sarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular. The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote."

In *Oregon-Wisconsin Timber Holding Co.* v. *Coos County*,[29] the Supreme Court of Oregon ruled:

"Safely it may be said that the right of suffrage is not an absolute unqualified personal right, but a franchise dependent upon law. None of the law writers include the right to vote among the rights of property or of person. The only restriction on the power of the states to regulate the qualifications of electors is to be found in the fifteenth amendment to the federal Constitution, which provides that the right of citizens of the United States to vote is not to be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Subject to this constitutional restriction, the states have exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote."

In proposing this legislation and urging its constitutionality to Congress, the Attorney General failed to recognize that the right to vote in State elections is a right to vote which is subject to every condition that a State chooses to impose except those prohibited by the Consti-

29. (1914) 71 Ore. 462, 142 P. 575, 576.

tution. The error of his position is demonstrated in the following quotation:

> ". . . *we* seek to abolish these (literacy) tests because they have been used in those places as a device to discriminate against Negroes.
>
> "It is not this bill—it is not the Federal Government—which undertakes to eliminate illiteracy as a requirement for voting in such states or counties. It is the states or counties themselves which have done so, and done so repeatedly, by registering illiterate or barely literate white persons. . . . It might be suggested that this kind of discrimination could be ended in a different way—by wiping the registration books clean and requiring all voters, white or Negro, to register anew under a uniformly applied literacy test.
>
> "For two reasons, such an approach would not solve, but would compound *our* present problem . . . (1) Negroes have been denied educational opportunity . . . (2) Fair administration of a new literacy test in the relevant areas would, inevitably, disenfranchise not only many Negroes, but also thousands of illiterate whites who have voted throughout their adult lives.
>
> *"Our concern today is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote.* Surely we cannot even purport to act on that concern if, in so doing, we reduce the ballot and correspondingly diminish democracy."[30]

Neither the Attorney General or the Congress, nor the Attorney General and the Congress, have the constitutional

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30. House Hearings, pp. 16 and 17; Senate Hearings, pp. 22 and 23. The remarks of the Attorney General in appearances before Congress are particularly significant in as much as he and his aides were the principal draftsmen and proponents of this legislation.

prerogative of enlarging representative government, nor is theirs separately or collectively the prerogative of increasing democracy. The 15th Amendment power of Congress is solely the power to enact *appropriate* legislation to enforce a prohibition against racial discrimination in voting. It is not a source of power to take over state electoral functions nor is it an authorization to create additional voters, black or white, or both. The Attorney General is certainly not entitled to erect his prejudices into principles.

In surveying the boundaries and limits of the power granted to Congress to enforce the 15th Amendment's self-executing veto of any state law or action which abridges or denies the right to vote on account of race or color, this Court should not give the slightest weight to the Attorney General's wish for more universal suffrage, rather, the judicial assay must be conducted with scrupulous regard for the constitutional necessity for enforcement of every nondiscriminatory qualification for voting set by each of the 50 States of the Union.

C.

There Is No Repugnance or Conflict Between the Power of State to Fix a Literacy Requirement for Electors and the Prohibition of the 15th Amendment.

From time to time during its history this Court has been called on to review legislation with an eye to determining whether or not Congress has exceeded the enumerated powers vested in it by the Constitution and thereby wrongly invaded powers belonging to the States; and in more than a few cases the Court has found that congressional action has transgressed on the Constitution and on

State sovereignty.[31] Thus, the mere fact that Congress decided to enact the Voting Rights Act cannot be treated as conclusive evidence that Congress possesses such power. Otherwise, serious discussion of constitutional limitations must cease.[32]

In *Sinnot* v. *Davenport*,[33] the power of Congress to regulate interstate commerce had been exercised through the medium of a statute requiring the enrollment and license of vessels engaged in the coasting trade at their home ports. The State of Alabama, some fifty years later, passed an act providing for the registration of the names of steamboat owners in Alabama and, acting under its law, detained the New Orleans based steamboat, Bagaby. The validity of the state statute was brought to this Court's attention on a writ of error to the Alabama Supreme Court. This

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31. See, e.g.:

Collector v. *Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122;
U. S. v. *Baltimore & Ohio R. R. Co.*, 84 U.S. (17 Wall.) 322, 21 L.Ed. 597;
United States v. *Reese et al.*, supra; footnote 16, p. 13;
United States v. *Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L. Ed. 290;
Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835;
James v. *Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979;
Hodges v. *United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65;
Coyle v. *Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853;
Newberry v. *U. S.*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913;
Bailey v. *Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432;
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815; and
Hopkins Federal Savings & Loan Assn. v. *Cleary*, 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251, 100 A.L.R. 1403.

(The *Reese*, *James* and *Newberry* cases were related to congresssional restrictions on voting action.)

32. *Newberry* v. *U. S.*, Footnote 31, supra, p. 25.

33. 63 U.S. (22 How.) 227, 16 L.Ed. 243.

Court found that the Alabama statute was in direct conflict with the exercise of the congressional power, and pointed out that the supremacy clause operated in case of such conflicts to make the congressional enactment paramount. This decision sets forth the correct approach to resolving such questions as that raised in this action, saying:

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the state law is but an exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together;* and also that the act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question. * * *
>
> "The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have not surrendered their power over the subject, and they exercise it independently of any control or interference of the general government; . . ."[34]

We submit there is no conflict or repugnance between the power of a state to prescribe a literacy qualification and the prohibition of the 15th Amendment. This Court has uniformly said there is not. In affirming the right of the State of Oklahoma to use a literacy test for voter qualification, the Court pointed out:

> "In fact, the very command of the (15th) Amendment recognizes the possession of the general power (over suffrage qualifications) by the state, since the amendment seeks to regulate its exercise as to the particular

34. Cf. *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, 929, 83 S.Ct. 1210, 10 L.Ed.2d 248; and *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 which reconciled State statutes alleged to conflict with congressional powers.

> subject with which it deals. . . . Thus the authority over suffrage which the states possess and the limitation which the amendment imposes are *coordinate* and *one may not destroy the other without bringing about the destruction of both.*"[35]

Similarly, in the case at bar there is no direct or positive repugnance or conflict between the power of the State of South Carolina to prescribe a fair and reasonable literacy qualification as a prerequisite to voting and the command of the 15th Amendment prohibiting racial discrimination. Since the two powers possessed by the respective sovereigns are without repugnance or conflict, conflict could never be created by what is, truly, *appropriate* legislation in pursuance of congressional powers. Legislation which would create a conflict where none exists is neither appropriate nor constitutional.[36]

Even a brief study of the background and legislative history of this act shows that literacy requirements of the type adopted and enforced by South Carolina weren't intended to be covered by the Act. A canvass of the voter qualifications selected for destruction by this Act, in the words of Congress:

> ". . . reveals that they are vague, arbitrary, hypertechnical or unnecessarily difficult, and have little (if any) bearing upon the capacity to cast an intelligent ballot."[37]

Plain, reasonable requirements that applicants possess the simplest of ability to read and write were really not

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35. *Guinn* v. *U. S.*, 283 U.S. 347, 362, 35 S.Ct. 926, 59 L.Ed 1340. This issue was most recently laid to rest in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072.

36. Cf. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852, 78 A.L.R.2d 1294.

37. House Report, p. 13. The Attorney General used almost the same language in describing the tests which the Act intended to cover. See House Hearings, p. 9.

within the contemplated sphere of action, yet the Act invades State sovereignty of South Carolina to proscribe just such a requirement.

The qualifications now required in Mississippi,[38] (a state which was one of the prime targets for this bill) and those now required in South Carolina,[39] (a State which just got "caught"), show on their face that they are simple, objective and encompass no more than the bare mechanical ability to mark a knowing ballot and comprehend printed notices of elections and voting instructions. Such qualifications are completely compatible with the Constitution and with a fundamentally sound republican government.

There is yet another basis for demonstrating a complete lack of repugnance or conflict. In adopting the Voting Rights Act, Congress was not exercising its power to "regulate" an area of conduct or commerce entrusted to its care full-sway. The 15th Amendment only vests in Congress authority to enforce a limited and definite prohibition—a prohibition which this Court has held to be self-executing. Since the 1st Section of the amendment operates to *ipso facto* write out all racially discriminatory terms and provisions of state voting *laws*, the appropriate subject of congressional enforcement power vested under the 2nd Section must, of necessity, relate to *misadministration*. Thus the appropriate legislation which Congress is empowered to enact should only be directed to correction of misapplication and should not attempt to create, through suspensions of some requirements, a new set of standards which are in conflict with and repugnant to the particular combination of qualifications adopted by the sovereign States.

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38. See Appendix A.

39. See Exhibit B to the Complaint and Appendix A to South Carolina's brief.

The Attorney General candidly admitted that misadministration was truly the basis for the Act.[40]

The demonstration of unconstitutionality of the Congressional Act here in question under this principle becomes even clearer when it is recalled that the asserted ground of conflict between state action and federal power as to South Carolina must have been based upon the assumptions of Congress as to misapplication by registrars in a portion of the counties of *other States* of the statutes of those other states since no widespread misuse of her laws has ever been suggested and no misuse has been proven in any court of law. There is no logic to a rule that would deny the use of a law forbidding prostitution in Houston, Texas, on a finding that officials in Galveston had been guilty of widespread systematic flaunting of that same law. If a law is valid, it ought to be enforced in every part of the jurisdiction in which it is applicable. If officers in one or many places are not correctly enforcing the law or are guilty of outright violations of such a statute, the errant officials ought to be corrected. Just as burning a barn is no practical way to get rid of a rat, so destroying a statute is no constitutional way to correct misadministration.[41]

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40. Attorney General Katzenbach: Yes, all literacy tests are nondiscriminatory as they are written. *The difficulty is in their administration,* Senator.

Senator Ervin: Nevertheless, this would wipe out the literacy test even though the literacy test in words was absolutely nondiscriminatory, and was applied alike to people of all races, wouldn't it?

Attorney General Katzenbach: Yes, it would.

Senator Ervin: And it would do that on the basis of an event which occurred before November 1964.

Attorney General Katzenbach: Yes, it would, Senator.

Senate Hearings, p. 59.

41. See Point III, infra, p. 32.

With even stronger logic we would observe that miscreants in *other States* have no semblance of authority to negate South Carolina's laws and Congress can invest them with none. When Congress casts so large a net that it creates a conflict between State and Federal functions as unnecessarily as was done in the instance of this Act, it clearly leaves every modicum of Constitutional authority behind.

D.

A "Suspension" of the Paramount Power of the States to Fix Reasonable and Non-Discriminatory Voter Qualifications and to Make Reasonable Changes in Such Qualifications Must Be Based upon Authority to Destroy That Power.

There is no such thing as suspended sovereignty.

Any valid claim of authority on the part of Congress to "suspend" state voter qualifications which do not in fact transcend constitutional prohibitions, or any claim of authority to prohibit a state from making reasonable changes in its qualifications without Federal approval, would have to find a basis in a constitutional grant of power broad enough to authorize the total destruction of such state laws. Such authority does not exist in the Constitution.

Legislative power to enforce the prohibition of the 15th Amendment is not analogous to the power to regulate interstate commerce. In the latter instance, the power is complete and plenary as to the entirety of the topic. Let the subject matter be in fact interstate commerce, and Congress is then empowered to take action which occupies all or any part of the "field." Its occupancy can suspend existing state enactments or negate them entirely. It can

proscribe present or future state legislation which is or may be in conflict therewith. For example, in *Parker* v. *Brown*,[42] the Court commented:

> "Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws."

On the other hand, when the grant of power is partial or limited and the remainder of the power in the "field" is vested in State sovereignty then Congress must confine itself to action within the ambit of the part of the power granted or its acts are unconstitutional. It is elementary that the grant of authority to establish post offices and post roads does not include power to establish a grocery store. Similarly, the power to enforce a limitation on state sovereignty which forbids that sovereignty to abridge or deny the right to vote on account of race, cannot reasonably be thought to include the power to withdraw from some of the states, through the process of so-called "suspension," their unquestioned right to require their electors to possess bare minimum literacy.

The fact that Congress has chosen to use the ingenious approach of "suspending" rather than frank, direct destruction makes the act nonetheless unconstitutional.[43] Obviously this Court would not permit a criminal prosecution to be conducted in violation of the 5th and 6th Amendments just because the convict was punished by a "suspended" sentence. The power to suspend must include the power to destroy, for if suspension can be

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42. 317 U.S. 341, 350, 63 S.Ct. 307, 87 L.Ed. 315.

43 An unconstitutional act cannot be made valid by a change of descriptive words. *Railway Express Agency* v. *Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450. The Attorney General, in proposing this legislation, used the words "suspend" and "abolish" interchangeably. *Senate Hearings*, Part 1, p. 162.

ordered once it can be ordered twice or a hundred times for a day, a week, a year or a hundred years. These are only matters of degree. Congress is granted neither the power to suspend nor the power to destroy as respects the adoption and use of reasonable, non-discriminatory voter qualifications in the several states of the Union.

III.

Neither Misapplication by an Executive Officer nor Improper Motive or Purpose on the Part of a Legislator Can Operate to Negate a Statute Which Is in Fact Constitutionally Valid.

Those proponents of the Voting Rights Act of 1965 who were willing to admit that the states all possess the right and power to establish a reasonable literacy qualification for voting, sought to justify the bill on the basis that selected states should be denied their power because they said administrative officials in some of those states had put such tests to discriminatory uses in the past.

Such a contention is completely illogical. Article I, Section 9, Clause 3, prohibits the enactment by Congress of any Bill of Attainder or *ex post facto* law, yet on more than one occasion the persons occupying the office of Congressmen and Senators and the President of the United States have been found guilty of violating this proscription.[44] It would be ridiculous to assert that the erroneous actions of these officials detracted from the powers which the Constitution granted to the Congress or the President.

The fact that prohibition was honored more widely in its breach than in observance was never claimed to write

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44. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366; *U. S.* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252; and *U. S.* v. *Brown*, infra, p. 52. See also Footnote 31, supra, p. 25, as to violations by Congress of other constitutional limits.

the 18th Amendment, or the statutes enacted pursuant to it, off the books. In fact, on the completely contrary presumption, Congress proposed and the States ratified the 21st Amendment to formally bring that era to a close.

Did the long years of discrimination in freight rates against the South in clear violation of Article 1, Section 9, Clause 6, cause that section to be any the less a part and parcel of the Constitution or did these persistent, widespread, invidious administrative misdeeds in any way operate to curtail the power of Congress over other phases of commerce? Of course not. One bad administrator or 1000 bad administrators cannot make a law which is good, bad. One bad Congressman or 500 bad Congressmen could not make a section of the Constitution bad any more than one bad judge or nine bad judges could destroy this Court. The institution, as distinguished from the men who temporarily serve it, must and does remain inviolate, otherwise the very machinery necessary to correct abuses would collapse. There is no such thing as a bad Court or a bad State.

There are also vast differences between the "freezing" principle which some courts of equity have applied to correct inequities of *court determined* discrimination and the five-year burden of proof which this legislative fiat lays on all *presumed guilty* States.

(1) In the Court cases the State or subdivision had been given its day in court to meet the case alleged against it.

(2) The courts maintain continuing jurisdiction of such causes to permit the subdivision to, at any time, show that it has ordered a re-registration of voters on an even basis *in accordance with the State's own statutes.*

(3) No court ever suspended the requirements that a voter possess bare minimum literacy of the type and to the degree required by South Carolina, which is no more than such literacy as is mechanically required to cast a knowing vote.[45]

(4) The courts never deprived the subdivision of simple means of keeping down corrupt practices *pursuant to the provisions of its own laws.*

(5) The court decrees sought to produce *compliance* with State standards and not *destruction* of a portion of those standards. They were designed to secure equal enforcement of standards set by the State, not to nullify those standards by stuffing the voter rolls "to increase democracy" or for any other high sounding reason.

In *Giles* v. *Harris*,[46] this Court ruled that it would not permit the actions of an administrative officer to make a void and unconstitutional statute valid, saying:

> "If the sections of the (State) Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent."

The converse of this situation has also been approved by this Court in *Duke Power Co.* v. *Greenwood County*.[47] The Fourth Circuit, speaking through Judge Parker, emphasized

45. It is also worthy of note that the relief sought by the Plaintiff in *U. S.* v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717, would have required the Negro applicant to possess the ability to read. Voter testing which requires possession of a 6th grade education level was recommended by the Civil Rights Commission and was maintained in the Federal law, by the Voting Rights Act of 1965 (See Section 15 and 42 USCA 1971).

46. 189 U.S. 475, 487, 23 S.Ct. 639, 47 L.Ed. 909.

47. 91 F.2d 665, 672, Aff. 302 U.S. 485, 58 S.Ct. 306, 82 L.Ed. 381.

that a valid statute could not be voided by an improper administration. Its reasoning was:

> "Confusion in thinking results from the method employed by plaintiff of arguing that the statute is unconstitutional 'as applied by the Public Works Administrator' in making the loan and grant here under consideration. This involves, of course, two questions: (1) The validity of the act of Congress when tested by the Constitution; and (2) the authority of the Administrator when tested by the act of Congress. A statute may not be held void because of the action of an executive officer in applying its provisions. Even when there is an abuse of executive power against which the courts cannot relieve because of their inability to control administrative discretion, the act of Congress under which the action is taken is not rendered invalid any more than it is by action which is absolutely unauthorized. The constitutional validity of the statute must be considered, therefore, without reference to what the Administrator is doing under it."

This Court's affirmance expressly approved this reasoning.

As a direct corollary to this line of authority holding that ministerial or executive officers can neither make a bad statute good nor a good statute bad, this Court has committed itself to the rule that if the Congress or a State Legislature possesses the constitutional power to enact a statute and it exercises that constitutional power to achieve a permitted end, the fact that speculation can be raised as to other motives for the legislation, which could place the Act beyond legislative power, cannot result in making the Act invalid. In *Ellis* v. *U. S.*,[48] the opinion stated:

> "Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with

48. 206 U.S. 246, 256, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann. Cas. 589.

its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of the law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded. however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes."

In *Stephenson* v. *Binford*,[49] the Court, speaking of State legislation, said:

> "We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the Legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

The true rule of statutory assessment is to be found in such cases as *McGowan* v. *Maryland*,[50] *Rast* v. *Van Deman & Lewis Co.*,[51] and *Lindsley* v. *Natural Carbonic Gas Co.*,[52] where this Court has held that if any state of facts reasonably can be conceived that would sustain a statute, it must be upheld. Statutes come to every court clothed with a presumption of constitutionality and correctness and the strong burden is placed on the attacker to demonstrate that the statute does not rest on any reasonable basis but is

49. 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721.

50. 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.

51. 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679.

52. 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369.

essentially arbitrary. This very rule will doubtless be urged in support of the Voting Rights Act, and rightly so. But if statutes are entitled to this status in the courts, they are none the less entitled to that status in the Congress. If they in fact can be shown to rest on a reasonable basis no congressional conjecture as to bad legislative motive can topple them and no administrator can be held to have subverted them by wrongful application.

Indeed, if litigants were allowed to delve below the surface of legislation to reconstruct supposed, submerged motives and intent, a number of aspersions might be cast on the Voting Rights Act of 1965, as witness the sentiment of the remarks of Daniel H. Chamberlain, a northern Republican who served as Reconstruction Governor of a Southern State. Writing in the *Atlantic Monthly*[53] concerning the adoption of the post Civil War Reconstruction Acts, he said:

> "Hardly anywhere else in recorded debates can be found so surprising a revelation of the blindness of partisan zeal as these discussions disclose. But it may now be clear to all, as it was then clear to some, that underneath all the avowed motives and all the open arguments lay a deeper cause than all others—the will and determination to secure party ascendancy and control in the South and the nation through the Negro vote. If this be a hard saying, let anyone now ask himself or ask the public, if it is possibly credible that the Reconstruction Acts would have been passed if the Negro vote had been believed to be Democratic?"

Only the last word need be changed for purposes of present day speculation. Just why Texas "happened" to be left out and States voting for Goldwater "happened" to be "caught" would also furnish interesting grist for such a mill.

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53 April issue, 1901, p. 473.

When the Voting Rights Act undertakes to translate its judgment of *misadministration* into power to nullify the *law* being administered, it attempts to do that which the courts have ruled cannot be done.

Cases Distinguished

An *amicus* does not customarily have an opportunity to respond to briefs filed by the parties. We would, therefore, beg leave to now distinguish several decisions of this court which have been urged as detracting from the established rule of statutory construction stated above. The first, and probably the most misconstrued precedent in the field of constitutional law, is Mr. Justice Matthews' decision in *Yick Wo* v. *Hopkins*.[54] In this *habeas corpus* action a Chinese laundryman sought freedom from imprisonment under the provisions of ordinances of the City of San Francisco relating to laundries. The Court's description of these ordinances was:

> "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withold consent, not only as to places, but as to persons; so that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but

54. 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The Court then proceeded to examine the record concerning the application of this unreasonable statute which conferred naked and arbitrary power, and found the record to disclose that more than 200 Chinese had been denied the opportunity to operate laundries, while that same right had been granted to 80 other persons—none of whom were Chinese subjects but all of whom were similarly situated. The Court reasoned that equal protection of law not only forbade discriminatory legislation but also nullified discriminatory administration of a valid law. The words of the Court expressing this second and separate principle were:

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Chy Luny* v. *Freeman*, 92 U.S. 275; *Ex parte Virginia*, 100 U.S. 339; *Neal* v. *Delaware*, 103 U.S. 370; and *Soon Hing* v. *Crowley*, 113 U.S. 703, S. C., 5 Sup. Ct. Rep. 730."

As stated, this was a *habeas corpus* proceeding; so, if Yick Wo's imprisonment was caused by an arbitrary, void statute, he was entitled to be released; and in the alternative, it was equally true that if his imprisonment was caused by misadministration of a fair law, he ought to be free. The Court concluded that both the statute and the administration of the statute had wrongfully caused Yick Wo's imprisonment, stating:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged."

Not a single intimation or inference can be properly drawn from any part of the Court's decision in the *Yick Wo* case as support for the principle that misadministration of a fair, reasonable law—one which would pass the *mandamus* test proposed in that opinion—could be negated by the whim, or desire, or misdeeds of administrative officials.

In *Lane* v. *Wilson*,[55] the Court considered the validity of an Oklahoma statute which was designed to correct the unconstitutional discrimination condemned in *Guinn* v. *U. S.*[56] The new statute was condemned on *its face* as arbitrarily and unreasonably confined. Its discriminatory result was "*inevitable*". The pertinent portion of the Court's opinion reads:

> "The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the Guinn Case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions

55. 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281.

56. Footnote 35, supra, p. 27.

imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in excep-

*[277]

tional cases a supplemental *period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes in question, the practical difficulties, of which the record in this case gives glimpses, *inevitable* in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was (t)here successfully invoked."

It would distort this Court's opinion to contend that a reasonably drawn statute, which did not have the *inevitable* effect of discrimination, could be voided by an administration which disregarded its terms. For example, if the statute had provided a 12-year period instead of a 12-day period for the supplemental registration procedures and the Court had found that 12 years was a reasonable period, then one or more state officials had refused to apply the law to Negro voters from and after the 12th day, any such acts of misapplication of the law would be grounds for court relief; but they could not condemn a proper, valid statute.

Davis v. *Schnell*[57] sought a judgment declaring that the Boswell amendment to the Alabama Constitution was *arbitrary* and void. The District Court found that it was, stating, in pertinent part:

57. 81 F.Supp. 872, *Aff.* 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093.

"The language does not call for a simple, fair or reasonable understanding or explanation. It does not say that the understanding and explanation must be partial, full, complete, definite, proper, fair, reasonable, plain, precise, correct, accurate, or give any rule, guide or test as to the nature of the understanding or explanation that is required. The Amendment does not say to whose satisfaction the applicant must 'understand and explain,' but under the statutes,[5] it must be to the reasonable satisfaction of a majority of the members of one of the 67 boards of registrars that are provided for the 67 counties of Alabama. * * *

"To state it plainly, the sole test is: Has the applicant by oral examination or otherwise understood and explained the Constitution to the satisfaction of the particular board? To state it more plainly, the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered. To state it even more plainly, the board, by the use of the words 'understand and explain,' is given the *arbitrary power* to accept or reject any prospective elector that may apply, or, to use the language of Yick Wo v. Hopkins, 118 U.S. 356, 366, 6 S. Ct. 1064, 1069, 30 L. Ed. 220, these words 'actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and *arbitrary power* to give or withhold consent * * *' The board has the power to establish two classes, those to whom they consent and those to whom they do not—those who may vote and those who may not. Such *arbitrary power* amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution, and is condemned by the Yick Wo and many other decisions of the Supreme Court."

Such a statute could not pass the *mandamus* test set out in *Yick Wo*.[58]

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58. Footnote 54, supra, p. 38.

The Court further found that the administration of this *arbitrary* amendment had unconstitutionally excluded Negro applicants for the franchise, while white applicants with comparable qualifications were being accepted. The District Court concluded that *both* the amendment *and* its administration were unconstitutional. In affirming, this Court cited both *Yick Wo* and *Lane* but called for a comparison of these cases with *Williams* v. *Mississippi*,[59] which distinguished *Yick Wo*. The former Mississippi election statutes discussed in *Williams* were held not to be discriminatory on their face. A showing that evil actions were possible under these statutes was rejected as not sufficient to overturn them. Williams' attorney claimed Williams had been convicted by a jury from which Negroes had been excluded by virtue of a law requiring all jurors to be qualified electors. Thus, the Court correctly pointed out that Williams would have been wrongfully convicted if he had shown that a valid election law had been misapplied in his county, just as his conviction would be erroneous if the laws had been void on their face. The Court certainly did not purport to rule that misadministration could void statutes which were, in fact, valid.

In *Gomillion* v. *Lightfoot*,[60] the Court condemned a statute gerrymandering the rectangular boundaries of an Alabama city into "a strangely irregular 28-sided figure". The lower courts sustained a motion to dismiss.[61] On appeal, this Court reversed, stating:

> If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a math-

59. 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012.

60. 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

61. 167 F.Supp. 405, 270 F.2d 594.

ematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

"It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens."

* * *

"While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

With deference, we emphasize that the Court in this case was not dealing with a statute which was susceptible of constitutional application. The allegations admitted by the motion to dismiss alleged legislation which was *solely* concerned with unconstitutional racial segregation. The Court spoke in terms of a law which had the *"inevitable"* and *"inescapable human effect"* of despoiling *"only"* Negro voting rights. Neither good nor bad administration could help or hurt it.

In *Nashville, C. & St. L. Ry. Co.* v. *Browning,*[62] the Court held that the State of Tennessee had the power to classify railroad property in a different "pigeonhole" from other property for tax purposes. A large volume of evidence had been offered in the courts below to show that administration of the state's tax statutes in such a manner as to over-tax railroads was the rule and not the exception. The lower court found the proof offered insufficient to over-

62. 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254.

come the presumption that reviewing officials had acted properly to equalize the taxes. *This Court stated that there was not enough evidence in the record to reverse this finding.* The Court further observed that since the State had a right to classify railroads differently from other property, a railroad could not be heard to complain that classification either by law *or* by practice had harmed them. By way of *obiter dicta,* the Court made the following passing comment in disagreeing with a contention of the State agency that since the statutes of Tennessee provided for fair taxation there could be no basis for a claim of denial of equal protection of *laws* within the meaning of the 14th Amendment.

> "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of *'laws'* (within the 14th Amendment phrase 'equal protection of the laws') to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state *law.* The equal protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and true *law* than the dead words of the written text."

What the opinion was saying was that a denial of the 14th Amendment's guarantee of equal protection of *laws* could not be shielded by the fact that the words of a statute or "law" did not justify the misdeeds of an officer. If, over 40 years, the assessors made it a uniform practice to over-assess railroads, the *practice* was a denial of equal protection, just as much as if the inequality were written

on the statute books of the state as a *"law"*. The issue which this comment in the *Nashville* case was discussing is not the question here. We hardily contend that Mr. Justice Frankfurter was not attempting, by way of this *dicta,* to commit this Court to the proposition that any single officer or any number of officials acting over any period of time could make a valid statute bad or an unconstitutional act good. There is a vast difference between ruling that misadministration can give rise to a cause of action or deprive a person of "equal protection of law" and ruling that it can *rewrite* a statute.

Certainly no one of these decisions logically supports an assertion that misuse of valid statutes creates a power in Congress to abolish or suspend the laws of a State. No one of them holds that a statute which is valid on its face can be judicially voided because of an invalid administration or by indulging in subjective psychoanalysis in the field of legislative intent.[63] With the utmost assurance, we contend that a statute which cannot be overturned through the *judicial* process cannot be nullified by *legislative* fiat.

IV.

The Voting Rights Act of 1965 Is a Bill of Attainder

A.

In Enacting the Voting Rights Act Congress Purported to Exercise Purely Judicial Powers and to Vest Legislative Powers in the Courts.

A frank study of the history of this legislation discloses that Congress assumed to (1) conduct a trial-type investigation, (2) make findings, and (3) pass a fiat enforc-

63. Cf. *United States* v. *Constantine,* 296 U.S. 287, 299, 56 S.Ct. 223, 80 L.Ed. 233.

ing liabilities in selected states on the basis of past facts. As indicative of Congressional spirit, we would refer to the remarks of Congressman McCullough to Attorney General Button of Virginia.[64]

> "You know, Mr. Attorney General, we sit here as members of this committee in *two capacities*, or at least, some of us do. Some of us sit here as *advocates* of legislation which we think is necessary to end discrimination in some States, in violation of the 15th amendment.
>
> "We also sit here in the *nature of judges* who are listening to the presentation of a case by the opponents and by the proponents. One of our major duties, if not our major duty, is not only to consider our position as *advocates* but to most seriously take our responsibilities as *judges*."

In performing its "advocate-judge" function, Congress may have acted out of the noblest of motives. Its actions were, nevertheless, absolutely unconstitutional. No matter how high its aims, nor how serious its purposes or how good its intents, they cannot substitute for constitutional power.[65]

It is perhaps incidental that mixed with its attempts to adjudicate, Congress wound up improperly placing legislative functions in the hands of the judiciary in this very same legislation. In the course of the *House Hearings*,[66] Attorney General Katzenbach assured Congressman Lindsay as follows:

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64. House Hearings, p. 569.

65. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160. No man can be judge in his own case even where he is authorized to exercise judicial power. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682.

66. P. 105.

"I believe that in setting up the objectives we may have *caught* possibly one State, possibly more, that have not used them (literacy tests) for discriminatory purposes. We may have *caught* a few counties that have not used them for discriminatory purposes.

"I think in general we have *caught* those States and counties which have discriminated and those which have not had the opportunity to come in and show that they have not done so."

In the *Senate Hearings*[67] he exchanged the following comment with Senator Ervin:

"Senator Ervin. Yes. But do you think that the Constitution gives Congress the power to determine by legislative enactment the guiit of a particular State or particular subdivision of the State on the question as to whether it violated the 15th amendment or the 19th amendment?

Attorney General Katzenbach. I think that Congress can set down reasonable standards in that respect, and then in addition it makes it possible for a State to be out from under that by reasonable tests

in the courts as to whether, in fact, that is fair or not."

Later[68] the following remarks passed between Senator Ervin and the Attorney General:

"Senator Ervin. You are striking down the literacy test application in the 34 North Carolina counties in the absence of any evidence. You are striking them down by congressional recital.

Attorney General Katzenbach. Striking them down by congressional recital and offering each and

67. P. 83.

68. *Senate Hearings.*

every one of those counties the opportunity to show that they have not discriminated."

We respectfully submit that it is clear from these quotations that the thrust of the bill was to cast an overly large net of guilt in the hope that it would be validated by a clause letting courts loose any "innocents" that were "caught". Just such a procedure was in these words condemned in *U. S.* v. *Reese*:[69]

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people."

Even legislation which is within the express power of a legislative body has been condemned when its sweep is made unnecessarily and unreasonably broad.[70]

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69. Footnote 16, supra, p. 13.

70. Cf. *Aptheker et al.* v. *Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 12 L.Ed.2d 992, and the cases there cited.

B.

Legislative Trials Are Abhorrent to the Constitutional Principles of Separation of Powers and Due Process

In *Kilbourn* v. *Thompson*,[71] Mr. Justice Miller, speaking for a unanimous court, stated:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.
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> This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two thirds of each House of the Legislature.
>
> So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the

71. 103 U.S. (13 Otto) 168, 190, 26 L.Ed. 377.

ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

In *Hepburn* v. *Griswold*,[72] Chief Justice Chase put the point thus:

"No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the

72. 75 U.S. (8 Wall.) 603, 611, 19 L.Ed. 513.

President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

"Not every Act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every Act of Congress that the judges are bound. This character and this force belong only to such acts as are 'made in pursuance of the Constitution'."

To whatever extent congressional action in the form of the Voting Rights Act of 1965 undertakes to exercise a restraint upon and displacement of the judicial power then, to precisely the same extent, that Act is unconstitutional.

In its June 7, 1965, decision in *U. S.* v. *Brown*,[73] this Court struck down an enactment of Congress as an unconstitutional Bill of Attainder. The Court began its discussion with a brief review of the history of that clause in our Constitution.[74] The relationship between the separation of the divisions of the national government and the prohibition of attainders was sharply drawn in this language:

"The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. *This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency.* It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enact-

73. ..... U.S. ....., 85 S.Ct. 1707, 14 L.Ed.2d 484.

74. Another note of historical interest is to be found in the appendix to the opinion of Mr. Justice Black in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 146, 71 S.Ct. 624, 95 L.Ed. 817.

ment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

> 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'

The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch. For example, Article III's grant of 'the judicial Power of the United States' to federal courts has been interpreted both as a grant of exclusive authority over certain areas. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60, and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by courts, e. g., Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153.

The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions * * *,' barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments. The Bill of Attainder Clause was regarded as such a barrier. Alexander Hamilton wrote:

'Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.'

Thus the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.

'Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode."[19]

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. 'It is

the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' Fletcher v. Peck, 6 Cranch 87, 136, 3 L. Ed. 162.

* * *

"Under our Constitution, Congress possesses full legislative authority, but *the task of adjudication must be left to other tribunals.*"

The Court's observations in this recent decision confirm the precise principles enunciated by Hamilton in the *Federalist Papers.* Some pertinent extracts from this rare document are:

"The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: *in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.* And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. * * *

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing."[75]

75. Federalist, No. 78, Madison Ed., pp. 363, 364.

The fact that Congress was dealing, in the *Brown* case, with an area where it had a wide latitude of power, to-wit, the commerce clause, did not deter the Court from condemning the legislation, stating:

> "Under the line of cases just outlined, § 504 plainly constitutes a bill of attainder. Congress undoubtedly possesses power under the Commerce Clause to enact legislation designed to keep from positions affecting interstate commerce persons who may use such positions to bring about political strikes. In § 504, however, Congress has exceeded the authority granted it by the Constitution. The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party."

In the present legislation though the words used do not call states by name, certain states have been carefully selected and designated in no uncertain terms.[76] The lack of a precise appellation to the states brought under this act does not cause it to be any the less a Bill of Attainder. The comparable reasoning in *Brown* was expressed in these words:

> "The Attorney General urges us to distinguish *Lovett*[77] on the ground that the statute struck down there 'singled out three identified individuals.' It is of course true that § 504 does not contain the words 'Archie

76. See Points C and D, infra, pp. 69 and 71.

77. *United States* v. *Lovett*, Footnote 44, supra, p. 32.

> Brown', and that it inflicts its deprivation upon more than three people. However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. *It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name.* Moreover, the statutes voided in Cummings and Garland were of this nature. We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder."

Under the rule of *Brown* the fact that in this case the deprivations of power to be visited on the "guilty" states are allegedly designed to be preventive rather than retributive, does not keep the visitation of these sanctions from being a form of punishment.

> "The Solicitor General argues that § 504 is not a bill of attainder because the prohibition it imposes does not constitute 'punishment'. In support of this conclusion, he urges that the statute was enacted for preventive rather than retributive reasons—that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events. He relies on American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, which upheld § 9(h) of the Taft-Hartley Act, the predecessor of the statute presently before us. In Douds the Court distinguished Cummings,[78] Garland[79] and Lovett on the ground that in those cases

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78. *Cummings* v. *State of Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356.

79. *Ex parte Garland*, Footnote 44, supra, p. 32.

'the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct.' Id., at 413, 70 S.Ct. at 691.

"This case is not necessarily controlled by Douds. For to prove its assertion that § 9(h) was preventive rather than retributive in purpose, the Court in Douds focused on the fact that members of the Communist Party could escape from the class of persons specified by Congress simply by resigning from the Party:

'Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.' Id. at 414, 70 S.Ct. at 692.

"Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the *past five years* been a member of the Party. However, even if we make the assumption that the five-year provision was inserted not out of desire to visit retribution but purely out of a belief that failure to include it would lead to *pro forma* resignations from the Party which would not decrease the threat of political strikes, it still clearly appears that § 504 inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

"Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribu-

tion. *A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations (as § 504 is) that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep them from bringing about the feared event.* It is also clear that many of the early American bills attainting the Tories were passed in order to impede their effectively resisting the Revolution.

> 'In the progress of the conflict, and particularly in its earliest periods, attainder and confiscation had been resorted to generally, throughout the continent, as a means of war. But it is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the persons against whom they were directed the option of avoiding them, by acknowledging their allegiance to the existing governments.
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> 'It was a preventative, not a vindictive policy. In the same humane spirit, as the contest approached its close, and the necessity of these severities diminished, many of the states passed laws offering pardons to those who had been disenfranchised, and restoring them to the enjoyment of their property * * *.'

"Thus Justice Iredell was on solid historical ground when he observed, in Calder v. Bull, 3 Dall. 386, 399-400, 1 L.Ed. 648, that 'attainders, *on the principle of retaliation and proscription*, have marked all the vicissitudes of party triumph.'

"We think that the Court in Douds misread United States v. Lovett when it suggested, 339 U.S., at 413, 70 S.Ct., at 691, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons."

The attainder effects of the present legislation can be seen even more clearly in the provisions restricting states singled out for inclusion in the act from going about their normal legislative processes in the future. This prohibition is based entirely upon a false presumption of future bad faith and unlawful conduct. This clause, with its effect of prospective punishment, is a part of an act wherein Congress hasn't set up a single legislative standard for conduct subsequent to November, 1964, which is to have the effect of bringing new states under the Act or releasing those "caught" otherwise than by authorizing a judicial proceeding in which such states are denied the presumption of innocence and are inflicted with a practically impossible burden of proof. Attorney General Katzenbach testified before the House Committee.[80]

> "Mr. Katzenbach. The justification for that (Section 5 of the Voting Rights Act covering changes in State law) is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States.
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> * * *
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> "If you look at the past history on this, it seemed to us that the State which had been discriminating in the past should be subjected to some kind of limitations as to any new legislation that it might propose.
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> * * *
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> "The Chairman. In other words, your language on page 7, line 25, is all-sweeping and covers the enactment of any law on voter qualifications.
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> Mr. Katzenbach: That is correct, Mr. Chairman . . ."

80. House Hearings, p. 60.

At the conclusion of these hearings, a report was issued containing the following statement:

> "The prevailing conditions in those areas where the bill will operate offer ample justification for congressional action because *there is little basis for supposing that the States and subdivisions affected will themselves remedy the present situation in view of the history of the adoption and administration of the several tests and devices reached by the bill.*"[81]

In the Senate hearings,[82] the Attorney General's insistence on a legislative conviction appears even stronger.

> "Attorney General Katzenbach. Senator, I think that where there has been prior misconduct and that has been shown, I don't see any difficulty to saying you have to serve a little period of penance here.
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> "Senator Ervin. Well, also I call attention—
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> "Attorney General Katzenbach. I will tell you, if some of the States repealed their literacy tests tomorrow, I wouldn't believe it was done in order to stop discriminating. I think it would be done because they had a new device."

Even though § 5 of the Act has not been precisely applied to the State of South Carolina, inasmuch as she has not changed or sought to change her laws, it is nevertheless under attack here in the complaint; and the part that this section plays in the over-all scheme of congressional action should be considered.

Contrary to the Attorney General's firmly expressed disbelief that any good thing can come from South Carolina or the other States attained, it is worthy of more than passing note to point to the actions taken by the Missis-

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81. House Report, p. 19.

82. Senate Hearings, p. 62.

sippi legislature prior to the passage of the Voting Rights Act, which, so far as the legislative history of the Federal act discloses, were not even considered by the Congress.[83]

These new Mississippi statutes (see Appendix A) place beyond the pale of controversy the possibility that any reasonable contention could be made that these new requirements are vague, arbitrary, hypertechnical or unnecessarily difficult or that they do not have a direct bearing upon the capacity to cast an intelligent ballot.

Forcing a State against its will to qualify as electors persons who cannot even write their name does not comport with common sense, let alone constitutional principle. When such a person marks a ballot it is a game of chance and not an intelligent act. What sort of justification can be advanced for forcing that decision on a State such as South Carolina, with 20% of her adult population illiterate, and at the same time permitting the State of Oregon with a 3% illiteracy rate to continue to impose a literacy test as a qualification for voting. Why should the ignorant 3% of Oregonians be denied the ballot when 1/5th of South Carolina's electorate is federally enfranchised and authorized to play a kind of voter's Russian

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83. The author of *United States* v. *Mississippi*, Footnote 45, supra, p. 34, recognized how wrong it was to pass judgment on a state's future conduct on the basis of what its officials might have done in the past. Mr. Justice Black, speaking in *Cameron* v. *Johnson*, ... U.S. ....., ... S.Ct. ....., 14 L.Ed.2d 715, said:

> It is true that we have only recently held that Mississippi must not deny the constitutional right of Negroes to register and vote. *United States* v. *Mississippi*, 380 U.S. 128. *But this, of course, does not mean that no good or valid law could come out of the State of Mississippi.* We should without hesitation condemn as unconstitutional discriminatory voting laws of Mississippi or of any other State. We should with equal firmness, however, approve a law which on its face is designed merely to carry out the State's responsibility to protect people who want to get into and out of the State's public buildings and to move along its highways freely without obstruction.

roulette with that State's government? Lack of educational opportunity is no answer, for it has never been shown, as to South Carolina or as to any of the states "selected", that sufficient schooling to produce the bare minimum literacy required to mark a knowing ballot has not always been available to members of all races. "Literacy and illiteracy are neutral on race, creed and sex, as reports around the world show."[84] When one pauses to consider how patently this Court approved the use of literacy tests in the *Lassiter* decision, the conclusion becomes inescapable that this congressional action was purely and simply a "legislative trial"—precisely the device condemned by Mr. Justice Douglas in his dissent in *Hannah* v. *Larche*.[85] Quoting from Alan Barth's "Government by Investigation", that opinion pointed out that the legislative trial was a device for condemning men without the formalities of due process. Continuing to quote, the decision stated:

> "The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) *it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law;* and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding."

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84. *Lassiter* v. *Northampton County Bd. of Elections*, Footnote 35, supra, p. 27. Texas, Florida and other States with heavy Negro populations could adopt voter intelligence requirements now which could be based on a 6th grade educational level, despite the fact that their past schooling has been racially segregated. So could California, where inferior Negro schooling was blamed in the McCone Report for the robberies, arson and murder stemming from the most recent race riot there.

85. 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307.

He then quotes from *Greene* v. *McElroy*:[86]

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but, also in all types of cases where administrative and regulatory actions were under scrutiny."

In Justice Douglas' words the opinion continued:

> "What we do today is to allow under the head of due process a fragmentation of proceedings against accused people that seems to me to be foreign to our system. No indictment is returned, no commitment to jail is made, no formal criminal charges are made. Hence the procedure is condoned as violating no constitutional guarantee. Yet what is done is another short cut used more and more these days to 'try' men in ways not envisaged by the Constitution. . . . This is a serious price to pay for adopting a free-wheeling concept of due process, rather than confining it to the procedures and devices enumerated in the Constitution itself. . . . *Men of goodwill not evil ones*

86. 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377.

only, invent, under feelings of urgency, new and different procedure that have an awful effect on the citizen."[87]

In three of the states which were "caught", judgments already rendered by the judiciary are frozen on these attained States and the courts alike for an arbitrary period of five years. Such a procedure not only wrongfully deprives the courts involved of a portion of their judicial power, but it also runs afoul of a problem involved in all anticipatory legislation, which was thus discussed by this Court in *Chastleton Corp.* v. *Sinclair*:[88]

". . . so far as this (legislative) declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Yet under § 4 (a) every Court is arbitrarily deprived of any discretion for a period of five years to make a finding of changed facts. This inflexible proscriptive period certainly runs counter to the effect required to be given to changes of State law (such as have occurred in the

87. Compare the approach of Attorney General Katzenbach when he was challenged as having placed execessive and arbitrary authority in himself to make determinations under Sections 4, 5, 6, 8 and 9:

"Attorney General Katzenbach: Senator, I don't like, as long as I am in this position, having to make the determinations which you regard as unbridled. But frankly I don't know a different way of dealing with it except the way that we have attempted. To go into court all the time and running into all those delays—I think if you balance some discretion on the part of the Attorney General against repeated denials of the right to vote, people who are entitled to vote, it is better to let the Attorney General have a little bit of discretion and get some people voting."

88. 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

State of Mississippi) by this Court's decision in *Beli* v. *Maryland*.[89]

The voting processes in these three "frozen" states are to be subjected to the unlawful infusion of a large percentage of persons who are so illiterate they can't read a name on a ballot or write a single letter of the alphabet. These are people described by President Lyndon Johnson as living in a world of darkness. Certainly they are correctly characterized by South Carolina as incompetents in the field of government.

This Act is coldly calculated to punish the convicted States by bringing the e masses of persons into the State's election processes and maintaining them there for a minimum of five years, with the expectation that they will make such inroads into the government that they can never be displaced. Such an attempt to adulterate the very political process that might be expected to right the wrong ought to be especially scrutinized.[90]

Although the 5th Amendment speaks in terms of the rights of a "person", which word does not normally include a State or governmental subdivision, it is hard to conceive that a central government established on the principles of limited, enumerated powers could be held to possess the power to condemn a portion of its creators without affording them a hearing.[91] No party ought to

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89. 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822.

90. Cf. Footnote 4 in *U. S.* v. *Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234.

91. Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, where the Court recognized that while a corporation was not a "citizen" within the privileges and immunities clause, it was a "person" within the meaning of the equal protection and due process clauses. The corporation was permitted to set aside a tax statute which purported to classify newspapers (that Huey Long didn't like) but which the Court could see was just a subterfuge because the legislature knew in advance exactly who would be covered and who wouldn't.

be condemned unheard. No better instrument has been devised for arriving at truth than to give one who is in jeopardy of serious loss, notice of the case against him and an opportunity to meet it. The Voting Rights Act is not a mere instance of name calling by public officials; it is a determination of status.[92] The Congress ought not be immune from the historic requirements of fairness merely because they act, however conscientiously, in the name of Civil Rights or against whole States rather than single officials.

Attorney General Katzenbach assumed the position with Congress that judicial processes were "too slow" when he asked for the novel powers of this Act. To the House he said:

> "What is necessary, what is essential, is a new approach, an approach which goes beyond the *tortuous, often-ineffective pace of litigation.*"[93]

In the Senate Hearings, he said:

> "It (the condition of low Negro voter registration) exists largely because *the judicial process,* upon which all existing remedies depend, *is institutionally inadequate* to deal with practices so deeply rooted in the social and political structure." (p. 9). "In place of fruitless legal maneuvering, the bill offers a workable administrative solution." (p. 14).

We respectfully submit that when officials of the Executive Department stand on the threshold of the opportunity to make proof in a Court of Law that they are entitled to bring to bear the broad new procedural rule made by this Court in *U. S.* v. *Mississippi,*[94] and blandly

92. House Hearings, p. 9.

93. House Hearings, p. 9.

94. Supra, footnote 45, p. 34.

assert to Congress that judicial processes are "inadequate" and "too slow", they do not thereby manufacture any lawful right for Congress to exercise *judicial* power. An emergency, real or imagined, does not create constitutional power.[95] The Attorney General's impatience with due process and his willingness to compromise procedural principles for sake of a quick, easy conviction remain beyond the bounds of the document which is law for rulers and men alike.

The United States is a nation which is unique in recorded time; and, we submit, for a single reason more than any other—it is governed by a written Constitution that does not bend or change with temporal winds and popular cries. This is a nation that is able to contain many views under the same flag. Some citizens believe that the Communist party is a menace to our security and that any process to rid the Country of that "menace" should be used. This Court does not agree that means beyond the Constitution are available.[96] Still other groups are quite dedicated to the belief that the present government of several Southern States are more deserving of opprobrium than the Communists. Both Communists and Southerners are lambasted in most new media, and any person (or court) who asserts that either group is entitled to the shield of the Constitution is likely to incur great wrath. But the plain truth is that short-cuts and deviations which respond only to *vox populi* make awful inroads on the rights of everyone, when, in other times, those precedents cut a different way. *The judicial process*

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95. *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061.

96. Recent examples are found in *U. S.* v. *Brown*, Footnote 73, supra, p. 52, and *Apthecker* v. *Secretary of State*, Footnote 70, supra, p. 50, and *Albertson, et al.* v. *SACB*, No. 3, Oct. Term 1965, 11/15/65.

is not "institutionally inadequate" in any institution which is compatible with the Constitution. In this case this Court is the first, last and only chance for the State of South Carolina to be accorded the guarantees of that document.

C.

The Act Was Drafted to Apply to Known, Named States and Subdivisions Alone and Its Purported "Formula" Is Merely a Sophisticated Subterfuge.

The rule which forbids sophisticated as well as simple-minded denials of constitutional rights applies to actions by the Congress equally as it does to State legislative action. The states selected for inclusion in this Act were known and often named.[97] Although Attorney General Katzenbach indicated that the 50% figure had been selected because it "is a good round number,"[98] his testimony in the Senate indicates that something more than happenstance was involved in the selection of that "good round number" and the other "trigger" procedures. There he testified:

> "Attorney General Katzenbach. Senator, in searching the test that made a relationship between the 15th amendment and these factors, I think one could, as I have said repeatedly here, fairly make this assumption in this test. If checking that against our figures, it indicated that the States of Mississippi, Louisiana, Alabama were not included within this test, I would have had doubts about the test myself, because I know

97. They are Louisiana, Mississippi, Alabama, Georgia, South Carolina, Virginia and 34 counties in North Carolina. See, e.g., House Hearings, pp. 12, 19, 42, 69, 77, 78, 85, 96, and Senate Hearings, p. 17. Alaska and one county each in Arizona, Idaho and Maine were "caught".

98. House Hearings, p. 26.

those are areas where we have brought repeated cases where we—where we have won cases and we have the facts in other cases which I believe establish violations of the 15th amendment.

"So I am frank to say if, in *experimenting as we did* with various tests to try to get them fair and objective, and with a relationship between that and the 15th amendment, if I had discovered that a test worked out in such a way that it included six States with no Negro populations and eliminated all States with large Negro populations, I would have looked again at the test."

Thus the selected states didn't just happen to come within the "test"—*the "test" was selected to fix those States chosen for conviction.* If one approaches the resolution of the legal question here without guile, one must admit that Congress has legislated against certain designated states and, therefore, congressional power to pass this legislation must forthrightly be tested as though Congress had frankly named the states to be included and pointedly excused all others not so named, for no one not included now can do anything which will bring them under the net. It is wrong and constitutionally false for a prospective voter in South Carolina of any race to be relieved of the requirement of completing an application form required by South Carolina law, when precisely the same form could be required in the State of Florida or Texas, where racial discrimination in voting was declared to be known to exist in testimony given to Congress, and there be enforced whether it had been enacted prior to or after the adop-

tion of the Voting Rights Act, just because the requirement was not on the statute books November 1, 1964.[99]

D.

The Creation of an Irrational, Irrebutable Presumption Results in Legislative Conviction and Forfeiture of Sovereign Rights Without Judicial Proceedings.

Completely without regard to race, color or previous condition of servitude, of those involved, this Act declares that wherever less than 50% of the persons of voting age in a state or subdivision were not in fact registered on a selected *past* date, or when 50% of such persons failed or

---

99. The following dialogue bears this out:

"Mr. Cramer: At the top of page 2, the test and device that triggers the approach in this bill, is the device or test which the Attorney General determines was maintained on November 1, 1964.

Mr. Katzenbach: Yes.

Mr. Cramer: Any State hereafter could enact literacy test statutes and not be subject to this bill; right?

Mr. Katzenbach: Yes; if it did not have a literacy test on November 1, 1964, then it could enact a literacy test law.

Mr. Cramer: They could discriminate in the future all they want to and not be subject to this bill.

Mr. Katzenbach: Congressman, I didn't intend to say that literacy tests always discriminate.

Mr. Cramer: I didn't either.

Mr. Katzenbach: I think we are hitting the areas here where there has been discrimination and that that discrimination has been through the use of literacy tests. I don't like literacy tests but I would have no constitutional objection to literacy tests in other States.

Mr. Cramer: Florida, Kentucky, and Tennessee could have literacy tests *tomorrow*, but they would not be subject to this bill.

Mr. Katzenbach: Correct."

House Hearings, p. 107. He could have added Texas and Arkansas also, both of which contain many counties with low voter registration and participation in areas of heavy colored populations, not to mention the District of Columbia. See Senator Ervin's statement in the Senate Hearings, p. 777.

neglected to vote in a designated *past* election, and the state was one of a known, named group of states which on the *past* date required its electors to demonstrate or possess literacy, then such a state is to be stripped of a part of its sovereign powers to enforce its own valid laws. This invalidation remains until the state goes to a Federal Court in Washington, D. C.[100] encumbered by a withdrawal of the presumption of innocence which normally attends every official act, and there assumes and carries the burden of proving that during the past five years there has been no denial or abridgement of the right to vote *on account of race or color* anywhere within its boundaries as the result of enforcement of its literacy requirement. Three states are decreed not to be entitled to even hazard such a burden for five years because *past* legal proceedings in a minor portion of their counties or parishes are made conclusive statewide for five years into the future.

Thus, the presumption is that if a state was a member of the group using specified voter qualifications and if its past statistical record was wrong, it must come in and prove—not what its 1964 statistics truly were—not that such statistics were not the result of denials on account of race or color, or that its 1964 requirements were valid—but, that for five years no denials of the right to vote be-

100. The Act tacitly admits the novelty of moving the cause of action from the place it arose and would normally be brought to Washington when Section 14(d) of the Act permits extra territorial process; but subpoenas for witnesses more than 100 miles from Washington can only be had, on a showing of cause, under an order of the Court. The suggestion that fixing the jurisdiction in Washington for the States was done out of a desire for uniformity of interpretation of the Act is wholly negated by permitting the Attorney General to range over the entire affected area bringing *his* suits in any U. S. District Court which normally has jurisdiction of the selected defendant. Section 12(f). The plain truth of the matter is that the Congress wanted to slam the door of every southern courthouse to litigation by the selected States to discourage and defeat any attempt by them to seek *judicial* relief from the legislative fiat.

cause of race or color have occurred anywhere in the state which were in any way connected with its then valid, yet now condemned, requirements have taken place.

> In *Wieman* v. *Updegraff*,[101] this Court stated: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

When the Attorney General admits that he has cast a presumption calculated to bring in innocents who are given the duty of proving their way out of the entrapment, with the shield of innocence denied to them, he admits that the Voting Right Act is arbitrary and unconstitutional because the presumption he designed is irrational, in addition to being, to all practical effects, irrebuttable. Numerous precedents exist in this Court's past decisions supporting this point. A number of these precedents were collected in the brief filed by the State of South Carolina (see pp. 56 and 57). These and other cases were cited in the most recent pronouncement of the Court on the subject, the case of *United States* v. *Romano*, No. 2, October Term, 1965, November 22, 1965. There the Court held that while presence at a still was a sufficient basis for a rebuttable presumption which would sustain a conviction for carrying on, aiding or abetting the business of distilling,[102] presence at an illegal still site had no reasonable or rational connection sufficient to support a conviction for possession, custody or control of such a still.

Low *registration* figures in areas where members of the Negro race reside in large numbers could conceivably have some relationship to racially discriminatory prac-

101. 344 U.S. 183, 191, 73 S.Ct. 215, 97 L.Ed. 216.

102. See *Gainey* v. *United States*, 380 U.S. 63, ____ S.Ct. ____, ____ L.Ed.2d ____.

tices. Low registration figures of Negroes as a racial group in such a community would be more probative.[103] But to completely eliminate any sort of a connection between the percentages used and racial make up of the population groups to which such figures were applied renders the "formula" of the presumption as irrational as that which was condemned in the *Romano* case. The reason the Voting Rights Act advanced the presumption proposed was that "experiments" showed it "caught" those states desired to be convicted and few enough others to make it have a veneer of fairness yet pass the Congress handily. Perhaps the most crushing proof of the arbitrary notion on which it is based is disclosed by the fact that its proponents would not hazard making it prospective but insisted on limiting its operation only to a past date. It is difficult to put into written words a more pointed demonstration of the *ex post facto* nature and effect of this legislation than was articulated by Mr. McCullough and Mr. Cramer and others in the *House Report* in this way:

> "(The Voting Rights Act's) 50 percent voter-registration test, or automatic triggering device, being *retrospective* in viewpoint, does not consider the actions of a State or political subdivision in the present, but rests upon *past* occurrences. Despite the gross injustices perpetrated by some individuals and governmental bodies, we find the creation of *penalties* today, to be applied in the form of indictments for *yesterday's sins*, to be philosophically undesirable, especially in the light of the delicate Federal-State relationship and the constitutional issues involved. There is no opportunity open to all for the redemption of wrongdoers. Good faith compliance with the spirit and letter

103. It was contended that such racial statistics are hard to compile, but it may be noted that Congress received "evidence" and "testimony" as to such statistics in a number of areas. E.g., House Hearings, pp. 32, 33, 35, 37, 135-257, 587-590; Senate Hearings, pp. 190, 771-773, 850-975, 1175-1445.

of the law after passage of this voting rights bill would be of no avail.

The *'numbers game'* approach, obviously designed to hit a pre-designated target, is clearly an *arbitrary* device unless we are to believe that, without evidence, without a judicial proceeding or a hearing of any kind, a contrived mathematical formula is capable of fairly delineating those States that discriminate on account of race or color and those that do not. As noted earlier, it is conceded by the committee-Celler bill's proponents that the figures used do not purport to show a proportionally low ratio of Negro to white registrants or voters which might reflect a pattern of racial discrimination. In fact, discrimination prohibited by the 15th amendment could continue untouched under the formula so long as 50 percent of the voting age population on November 1, 1964, was registered or voted—*even if they were all whites.* We find it to be quite illogical to declare, on the basis of the formula, that Louisiana is guilty of discriminating since it had only 47.3 percent of the eligible population voting in the 1964 election, while Hawaii with 52 percent voting is deemed innocent (subcommittee transcript, p. 29). Meanwhile, Texas escapes censure, although it had only 44 percent participation. Yet, as a result of this arbitrary calculation, a State's voting qualifications are suspended until it comes to a selected court in the District of Columbia and establishes the fact that its 'tests and devices' were never used during the past 5 years to deny or abridge the right to vote.

The fair and effective enforcement of the 15th amendment calls for precise identification of offenders, not the *indiscriminate scatter-gun technique* evidenced in the 50 percent test. Where local election officials practice discrimination, a Federal remedy should be readily available to be swiftly administered even if 99 percent of the eligible voters are properly registered or voted. However, the committee-Celler bill with its 50 percent test would engulf whole States in a tidal wave of Federal control of the election process, even

though many of the counties or parishes within that State may be acknowledged by all to be absolutely free of racial discrimination in voting."[104]

V.

The Constitution Does Not Permit the Classification of States.

Article IV, Section 3, Clause 1 of the Constitution provides:

> "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

The decisions of this Court have consistently emphasized that this permission to admit new states was a permission to admit such states on a basis of equality with the states that originally formed the Union. The admitting acts of the various states have uniformly provided that they are to be admitted on the same basis as the original states in all respects whatever.[105]

A little over a year after Mississippi was admitted to the Union this Court, in *McCullough* v. *Maryland*, supra (p. 410 of 17 U.S.), stated:

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We can-

104. House Report, p. 45.

105. See, e.g., the Enabling and Admitting Acts for the State of Mississippi, supra, p. 2.

not comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time."

In *Pollard, et al.* v. *Hagan, et al.*,[106] the Court had occasion to discuss the status of states admitted out of the territories ceded by the original states of Virginia and Georgia (which includes Mississippi). The Court there pointed out that the deeds of cession contained an express stipulation as to any new States formed out of the land cedes that "such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." In discussing such a new State's sovereignty, the Court stated:

"The right of Alabama and every other new State to exercise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted, and remain unquestioned, except so far as they are temporarily, deprived of control of the public lands."

In *Permoli* v. *Municipality No. 1 of the City of New Orleans*,[107] the Court held that the act admitting the State of Louisiana had authorized the framing of a State Constitution which established, among other things, a republican government. In discussing the relationship of the new State to the ordinance of Congress which formerly governed the

106. 44 U.S. (3 How.) 212, 224, 11 L.Ed. 565.

107. 44 U.S. (3 How.) 589, 610, 11 L.Ed. 739.

Territory before the State was created, the opinion provided:

> "So far as they conferred political rights, and secured civil and religious liberties (which are political rights) the laws of Congress were all superseded by the State Constitution. Nor is any part of them in force, unless they were adopted by the Constitution of Louisiana as laws of the State. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all of the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act;"

This reasoning was based upon the fact that Congress had admitted the State "on an equal footing with the original states in all respects whatever."

In speaking of the status of admission of the State of Illinois in *Escanaba and Lake Michigan Transportation Co.* v. *City of Chicago*,[108] this Court stated:

> "On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the act of admission is, 'on an equal footing with the original states *in all respects whatever*.' 3 St. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new." (Emphasis by the Court.)

The leading case in this field and the one which laid the principle to rest so strongly that it has not substan-

108. 107 U.S. 678, 2 S.Ct. 185, 193, 27 L.Ed. 442.

tially arisen since is *Coyle* v. *Smith*,[109] where the Court stated:

> "The power is to admit 'new states into *this* Union.' (Emphasis by the Court.)
>
> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.
>
> The argument that Congress derives from the duty of 'guaranteeing to each state in this Union a republican form of government,' power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,—Minor v. Happersett, 21 Wall. 162, 174, 22 L. ed. 627, 630,—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union."

109. 221 U.S. 559, 31 S.Ct. 688, 66 L.Ed. 853.

In *United States* v. *Texas*,[110] the Court reasoned that what is now referred to as the "equal footing" clause (Article IV, Section 3, Clause 1, supra) could not be meant to overcome differences in area, location, geology and latitude which create diversity in economic aspects, rather it was reasoned that the clause was intended to create "parity as respects *political standing and sovereignty.*"[111]

Any classification of states such as Congress has attempted to make in the Voting Rights Act is bound to destroy the parity of political standing and sovereignty of the states. Such a destruction of equality is contrary to the "equal footing" clause of the Constitution. South Carolina has the same right to have a literacy test that Oregon does. She cannot constitutionally be required to come to the District of Columbia to prove her entitlement to make or enforce such a requirement for her electors.

CONCLUSION

Congress exceeded the limits of the Constitution in enacting the Voting Rights Act of 1965.

Respectfully submitted,

JOE T. PATTERSON,
Attorney General;

DUGAS SHANDS,
Assistant Attorney General; and

CHARLES CLARK,
Special Assistant Attorney General of the State of Mississippi.

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110. 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221.

111. P. 716 of 339 U.S. Cf. *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169.

The Mississippi Code, as amended June 30, 1965, provides in pertinent part:

3209.6. FORM OF APPLICATION BLANKS.

Applications for registration as electors of this state shall be made upon a form in the following words and figures:

APPLICATION FOR REGISTRATION

Under penalty of perjury, write the following answers:

1. What is your full name? .....

2. What is your date of birth? .....

3. Are you a citizen of the United States? .....

4. What is your present residence address and each place you have resided during the past two years, stating when you lived at each place?

   a. Present Address: .....;
   From ..... to date.

   b. Previous Address: .....;
   From ..... to .....

   c. Previous Address: .....;
   From ..... to .....
   (If you need additional space use the back side of this form.)

5. Are you a minister of the gospel in charge of an organized church, or his wife legally residing with him? .....

6. Have you ever been convicted of the crime of bribery, theft, arson, obtaining money or goods

under false pretense, perjury, forgery, embezzlement or bigamy? .....

After you have answered 1 through 6 above, sign the following oath in the presence of the registrar or deputy registrar.

"STATE OF MISSISSIPPI,
County of .....:

I do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this county), and that I will have resided in this state two years and my present election district of this county one year next preceding the ensuing election (or if it be stated above that the person proposing to register is a minister of the gospel in charge of an organized church, or his wife legally residing with him, then it will be sufficient to aver therein two years' residence in the state and six months in said election district), and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this state as a disqualification to be an elector; that I have truly answered all questions propounded to me in the foregoing application for registration; and that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So help me God.

Applicant sign here: .....

Sworn to and subscribed before me, this ..... day of ....., 19.....

.....
Registrar or Deputy Registrar"

SEC. 2. The boards of supervisors are authorized to make proper allowances for office supplies reasonably necessitated by this act.

SEC. 3. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 4. This Act shall take effect and be in force from and after its passage.

3209.7. PERSON NOT TO REGISTER UNLESS HE CAN READ AND WRITE—COMPLETION OF APPLICATION FOR REGISTRATION—AFFIDAVIT OF PHYSICAL DISABILITY—PRESERVATION OF RECORDS.

A person shall not be registered unless he is able to read and write. The county registrar shall make available during regular office hours blank applications for registration in the form required by law, to those persons resident in his county who desire to apply for registration, and shall administer the oath to applicants completing such form. The application shall be completed in the handwriting of the applicant. In case an applicant is physically disabled, the registrar shall provide such applicant with any assistance necessitated by such disability, and an affidavit showing the nature of such disability shall be attached to the registration form. The registrar, or any successor in office, shall file and retain in his office all applications for registration, together with any affidavits of disability received in connection therewith, for a period of two years from the date thereof.

SEC. 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act,

but shall be confined in its operation to the cause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 3. This Act shall take effect and be in force from and after its passage.

3212. REGISTRAR TO REGISTER VOTERS.

Every person entitled to be registered as an elector in compliance with the laws of this state shall sign his name in the column provided therefor on the registration book and thereupon shall be registered by the registrar on the registration books of the election district of the residence of such person.

SEC. 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 3. This Act shall take effect and be in force from and after its passage.

3235. WHO ENTITLED TO VOTE.

Every inhabitant of this state, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, twenty-one (21) years old and upwards, who has resided in this state two (2) years, and one year in the election district or city, town or village in which he offers to vote, and who is able to read and write and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never

been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, and who has paid all poll taxes which may have been legally required of him, and which he has had an opportunity to pay according to law, for the two (2) preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such poll taxes on or before the first day of February of the year in which he shall offer to vote, shall be a qualified elector in and for the election district or city, town or village of his residence, and shall be entitled to vote at any election held not less than four (4) months after his registration; but any minister of the gospel, in charge of an organized church, or his wife legally residing with him, shall be entitled to vote after six (6) months' residence in the election district, city, town or village, if otherwise qualified. No others than those above included shall be entitled, or shall be allowed, to vote at any election; provided, that a person unable to read or write by reason of physical disability shall, if otherwise qualified, nevertheless be entitled to vote.

SEC. 2. All laws and parts of laws in conflict with this statute are hereby repealed.

SEC. 3. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which judgment shall have been rendered.

SEC. 4. This Act shall take effect and be in force from and after its passage.

FILE COPY

DEC 2 0 1965

JOHN F. DAVIS, CLERK

No. 22, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States,

Defendant.

AMICUS CURIAE BRIEF IN BEHALF OF THE STATE OF LOUISIANA

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
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Special Counsel

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STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH
Attorney General of the
United States,

Defendant.

MOTION FOR LEAVE TO ORALLY ARGUE

In accordance with this Honorable Court's invitation contained in its order of November 5, 1965, the State of Louisiana hereby expresses a desire to be permitted to participate in the oral argument of this case whenever heard.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
Special Counsel.

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Attorney General of the
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Defendant.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The STATE OF LOUISIANA, by its Attorney General and its Special Counsel, asks leave of the Court to present its Amicus Curiae Brief, in accordance with this Honorable Court's invitation contained in its order of November 5, 1965.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

THOMAS W. McFERRIN, SR.,
SIDNEY W. PROVENSAL, JR.,
Special Counsel.

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Attorney General of the United States,

Defendant.

AMICUS CURIAE BRIEF IN BEHALF OF THE STATE OF LOUISIANA

STATEMENT

This brief amicus curiae is filed by the STATE OF LOUISIANA pursuant to this Court's order of November 5, 1965, granting to any interested State the right to submit such a brief in the above-entitled case. The interest of the State of Louisiana stems from the fact that the Voting Rights Act of 1965, Public Law 89-110, 89th Congress, S-1564, directly affects the State of Louisiana by setting aside that State's literacy test. La. Rev. Stat., Title 18, § 31.

SUMMARY OF ARGUMENT

The Tenth Amendment reserving all powers to the States not delegated to the Federal Government

is violated by the Voting Rights Act because each State has the constitutional right to determine the qualifications of voters, and it may exercise this right to impose a literacy test which does not discriminate based on race, color, or previous condition of servitude.

Congress is limited by the Fifth Amendment in respect to the statutory presumptions which it may create. Such a presumption must be a logical inference from the known fact, and not based on mere speculation or surmise. In the instant case, the mere fact that less than 50 per centum of a State's adults were registered or voted does not show that a literacy test it imposes was used to engage in racial discrimination. Abolition of the State's literacy test is not an enforcement of the Fifteenth Amendment, but rather an enlargement of that Amendment. There are many other tools that Congress can use to enforce the Amendment without violating the Constitution by infringing on valid State powers.

ARGUMENT

POINT I.

ANY STATE HAS THE CONSTITUTIONAL RIGHT TO IMPOSE A LITERACY TEST AS A QUALIFICATION FOR VOTERS, AND CONGRESSIONAL INTERFERENCE WITH SUCH RIGHT VIOLATES THE TENTH AMENDMENT.

Before the ratification of the Fifteenth Amendment, the States had exclusive control over the qual-

ification of voters for all offices. Constitution of the United States, Art. I, §§ 2, 4. See also *Spragins v. Houghton*, 3 III. 377, 395-6 (1840); *Huber v. Reilly*, 53 Pa.St. 112, 115-6 (1866); Cf. *McKay v. Campbell*, 16 Fed. Cas. 157, 160, No. 8839 (Ore. 1870). The enactment of the Fifteenth Amendment simply restrained the States from making any discrimination based on race, color, or previous condition of servitude. In all other respects, the States continued to be free in setting such qualifications for voters as they might choose.

The above rule was recognized and reaffirmed by the members of Congress who played a leading part in the drafting and proposal of the Fourteenth and Fifteenth Amendments. Thus, Congressman John A. Bingham, the Radical Republican from Ohio who drafted the First Section of the Fourteenth Amendment, declared on behalf of the House Judiciary Committee that the franchise was not a "privilege or immunity of citizens of the United States" and that "the adoption of the Fifteenth Amendment of the Constitution imposing these three limitations upon the power of the several States, was, by necessary implication, a declaration that the States had the power to regulate by a uniform rule the conditions upon which the elective franchise should be exercised by citizens of the United States resident therein." House of Representatives, Report No. 22, 41st Cong., 3rd Sess. 2-3 (Jan. 30, 1871). Likewise, a unanimous Senate Judiciary Committee reported:

"The fifteenth amendment . . . must be regarded

> as recognizing the right of every State, under the Constitution as it previously stood, to deny or abridge the right of a citizen to vote on any account, in the pleasure of such State; and by the fifteenth amendment the right of States in this respect is only so far restricted that no State can base such exclusion upon 'race, color, or previous condition of servitude.' With this single exception —race, color, and previous condition of servitude —the power of a State to make such exclusion is left untouched, and, indeed, is actually recognized by the fifteenth amendment as existing." Senate Report No. 21, 42nd Cong., 2nd Sess. 4-5 (Jan. 25, 1872).

The principle that the qualifications of voters are within the exclusive control of the States has been reaffirmed time and again by this Court. Only a few years after the ratification of the Fifteenth Amendment, this Court held in *Minor v. Happersett*, 21 Wall. 162, 177-8 (1875):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

A quarter of a century later, this Court again reviewed the rights of States to establish qualifications

for voting, and once again held in *Pope v. Williams*, 193 U.S. 632, 633 (1904):

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. . . . It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper. . . ."

Only last year, the Court reaffirmed the same principle in *Carrington v. Rash*, 380 U.S. 89, 91 (1965), where it declared:

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, 'the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.'"

Dealing specifically with literacy tests, this Court unanimously concluded in *Lassiter v. Northampton Election Board*, 360 U.S. 45, 53-54 (1959):

> "The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determin-

ing whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot."

The right of each State, therefore, to impose a literacy test or other test or qualification upon a voter is not an open question, either in regard to the original intent of the framers of the Fifteenth Amendment, or this Court. Since this power to impose a literacy test is one reserved to the States, any attempt by Congress to interfere with such a State-imposed test violates the Tenth Amendment.

POINT II.

THE PRESUMPTION THAT A STATE IS USING A LITERACY TEST TO DISCRIMINATE BASED ON RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE BECAUSE LESS THAN 50 PER CENTUM OF THE PERSONS OF VOTING AGE WERE REGISTERED OR VOTED IN A CERTAIN ELECTION IS BEYOND CONGRESS' POWER TO MAKE AND FORBIDDING A LITERACY TEST BASED ON SUCH PRESUMPTION IS NOT AN ENFORCEMENT OF THE FIFTEENTH AMENDMENT.

A. Congress is Constitutionally Limited in Its Creation of Statutory Presumptions.

The constitutionality of the Voting Rights Act must rest, if it has any basis at all, on Section 2 of the

Fifteenth Amendment, which gives Congress the right to enforce Section I by "appropriate" legislation. Since a literacy test is neither a race, color, or previous condition of servitude, it follows that Congress is not enforcing the First Section but rather adding to it. This alone is enough to invalidate the statute.

However, the Congressional theory seems to be that if a literacy test is imposed with the intent of disqualifying voters of a particular race or color (no doubt, Negroes here), then Congress may ban such a test as a means by which the prohibited discrimination is effectuated. Although the legislative history of the Fifteenth Amendment does not permit Congress to act on mere motive when the discrimination itself is not based on the three prohibited factors, assuming *arguendo* that Congress may base its action on the intent of the State legislators in instituting a literacy test, nevertheless, Congress is not at liberty to find or presume such motive from any set of facts which it may choose. The Due Process Clause of the Fifth Amendment must be complied with in the making of such presumptions. In *Tot v. United States*, 319 U.S. 463, 467-8 (1943), this Court held:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act trangresses those limits."

"The Government seems to argue that there are

> two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there bo no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitary because of lack of connection between the two in common experience."

In the *Tot* case, this Court held that a statutory presumption that a person who had previously been convicted of a crime of violence had obtained a firearm found in his possession from interstate sources after the effective date of the statute was unconstitutional because it was equally possible that he obtained the firearm in intrastate commerce or obtained it before the date of the statute. In other words, a presumption is unconstitutional if the fact which "triggers" the fact presumed is equally consistent with the absence of the fact presumed.

Likewise, this Court held in *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639, 642 (1929):

> "A statute creating a presumption that is arbitrary . . . violates the due process clause of the Fourteenth Amendment, Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property."

The most recent example of this occurred only this term. *In United States v. Romano* (Oct. Term, 1965, No. 2, unreported), this Court held unanimously that a federal statute stating that guilt of the crime of possession, custody, or control of an illegal still may be inferred from proof of the defendant's presence near the still was unconstitutional. This rule was laid down in spite of the fact that a considerable portion of individuals near such a still would indeed be guilty of the underlying crime. However, since the net drags in too many innocents, even a legislative inference may not be drawn.

The constitutional rule laid down by this Court has been applied in a considerable variety of instructive lower Court and State Court decisions. Some more recent illustrations will show the breath of the rule. For example, it has been held that a statutory presumption of intent to injure competition derived from sales below or near cost is unconstitutional. *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70 (D.Minn. 1938); *Mott's Super Markets, Inc. v. Frassinelli*, 25 Conn. Sup. 160, 199 A.2d 16 (1964); *Wiley v. Sampson-Ripley*, 151 Me. 400, 120 A.2d 289 (1956). It has been held that a legislative presumption of gambling derived from possession of a federal gambling stamp is unconstitutional. *Jefferson v. Sweat*, 76 So.2d 494 (Fla. 1954). A statute presuming fraud from failure to perform a contract is unconstitutional. *Rawdon v. Garvie*, 227 S.W.2d 261 (Tex. Cir. App. 1950). Possession of a needle suitable for narcotics may not be made presumptive proof of intent to use

such narcotics unlawfully. *State v. Birdsell*, 235 La. 396, 104 So.2d 148 (1958); *People v. Bellfield*, 210 N.Y.S.2d 450 (1961). Receipt of stolen property from a minor may not be made the basis of a presumption that the defendant adult knew that it was stolen by a statute. *People v. Stevenson*, 26 Cal. Repts. 297, 376 P.2d 297 (1962). See also *Government of Virgin Islands v. Torres*, 161 F.Supp. 699 (V.I. 1958); *People v. Gazulis*, 212 N.Y.S. 2d 910 (1961). Likewise, it has been held that a statute making the presence of blood on a rape victim's clothing evidence of rape is unconstitutional. *Colon-Rosich v. People*, 256 F.2d 393 (1st Cir. 1958). In all of these cases, a considerable number of people who did the act on which the presumption was based also were guilty of the presumed act. However, there was no necessary connection between the two. Many innocent people might also be covered by the presumption. Hence, it violated due process. As the Supreme Court of Pennsylvania held in *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 7 A.2d 302, 315 (1939), in striking down as unconstitutional a legislative presumption of an employer's negligence derived from proof of discharge of the employee after physical examination or inability to secure another job because of occupational disease:

> "When mere conjectures are by legislative fiat accepted in courts of justice as substitutes for facts and reasonable inferences, our trials will invite the characterization the then leader of the American Bar in 1898, Joseph H. Choate, publicly applied to the trial of Emile Zola . . . 'It *purported*

to be a jury trial, but for reckless disregard of every principle of right and justice, it is without a precedent in modern history.' "

B. *The Presumption of Racial Discrimination Based on a Low Vote is Unconstitutional*

In the instant case, Congress has presumed that because a literacy test is in effect, a low registration or a low vote at the last Presidential Election means that such a test has been instituted or retained for the purpose of engaging in racial discrimination. This is a complete *non sequitur*. A low registration or vote may be caused by a wide variety of factors. For example, the State or subdivision may in fact have a high rate of illiteracy, leading to a low vote in proportion to the total adult population through the perfectly legitimate operation of the test without regard to any racial descrimination at all. Disgust with both presidential candidates may reduce the vote appreciably. Where the strength of one party has traditionally been overwhelming, as in the South, so that local races are for all practical purposes decided in that party's primary election, far fewer voters of all colors will trouble themselves to turn out in the general election to merely endorse a foregone conclusion. The weather, low economic background, and a wide variety of other factors have a bearing on the size of the vote. To attribute a low vote to a misuse of a literacy test is to sweep the guilty and innocent together in a giant dragnet. If this Court's prior standards as to presumptions are to be given anything more than lip-serv-

ice, such a statutory presumption cannot stand the scrutiny of the Bill of Rights.

To illustrate how groundless is the presumption, it is merely necessary to note that the literacy tests in the State of Alaska have been abolished although no one ever alleged that there was any discrimination in voting in that State. Thus the invalidity of the presumption is made quite evident. What Congress has done is to "throw the baby out with the bath." Along with discriminatory use of the literacy tests, it has abolished the tests themselves. This is not an enforcement of the Fifteenth Amendment. An enforcement of a prohibition against discrimination cannot include a substantive change in the law to be enforced broadening it merely because such a substantive change is a convenient way of striking at the prohibited discrimination. There are many ways of eliminating discrimination without knocking down all State restrictions merely because they may have been misused. *In Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 674 (1961), this Court, in dealing with an analogous problem in the labor law field, held that hiring halls could not be banned under the guise of enforcing the prohibition against discrimination merely because they were on occasion misused to engage in such discrimination. This Court said:

> "There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that

encourages or discourages union membership."

The pith of the dispute here is that Congress, finding evidence of occasional misuse in Southern States of literacy tests to engage in racial discrimination, and becoming impatient with the shole judicial process in eradicating such discrimination, decided to short-circuit this process by abolishing literacy tests completely instead of giving either the Courts or Administrators additional power to eradicate such prohibited discrimination. This is just the sort of legislative hysteria leading to unconstitutional short-cuts which the Bill of Rights was designed to prohibit. If due process means anything, it means that congressional frenzy or impatience is not a good excuse for cutting a seeming Gordian knot by brushing away the exercise of legitimate State powers. If any proof is needed that Congress has taken leave of its constitutional scruples, it is Section 4 (c) of the Voting Rights Act, recently held unconstitutional in *Morgan v. Katzenbach*, (U.S. Dist. Ct., Dist. of Col., Nov. 15, 1965, unreported.). Instead of carefully weeding out the remnants of resistance to the Fifteenth Amendment, Congress has been shooting from the hip with all sorts of trigger clauses which leave gaping holes in State statutes, however fairly they are administered. The Fifteenth Amendment does not give the Congress this sort of ammunition.

It is not as if Congress is being compelled to assume unconstitutional powers because it is patently impossible to eradicate racial discrimination in any

other way, assuming, contrary to all law, that this would be an excuse. No one has suggested that the Civil Rights Division of the Department of Justice, which has the primary task of enforcement, is either incompetent or apathetic. Nor can it be justly claimed that the Federal Judiciary is lethargic, even in the South. Moreover, this Court, as the capstone of the Judiciary, does not let grass grow under anyone's feet, either. See *Mississippi v. United States*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965). There is no good reason for Congress to start a whole prairie fire and burn up State statutes wholesale to kill the few remaining weeds of discrimination still surviving in the South.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court hold that insofar as the Voting Rights Act of 1965 suspends literacy tests in a State because 50 per centum of the adult population was not registered or did not vote in November, 1964, the statute is in excess of Congress' power to enact and is void.

Respectfully submitted,

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(Cantab.)
Special Counsel

By _____

December, 1965

CERTIFICATE

I certify that a copy of the above and foregoing Amicus Curiae Brief for the State of Louisiana has been served upon both Plaintiff and Defendant in Original No. 22, United States Supreme Court, October Term, 1965, this ____ day of December, 1965.

_____

Of Counsel

B-441, 12-65

FILED
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JOHN F. DAVIS, CL

NO. 22, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

STATE OF SOUTH CAROLINA

Plaintiff

v.

NICHOLAS deB. KATZENBACH,
Attorney General of
the United States,

Defendant

MOTION BY STATE OF ALABAMA FOR LEAVE TO INTERVENE

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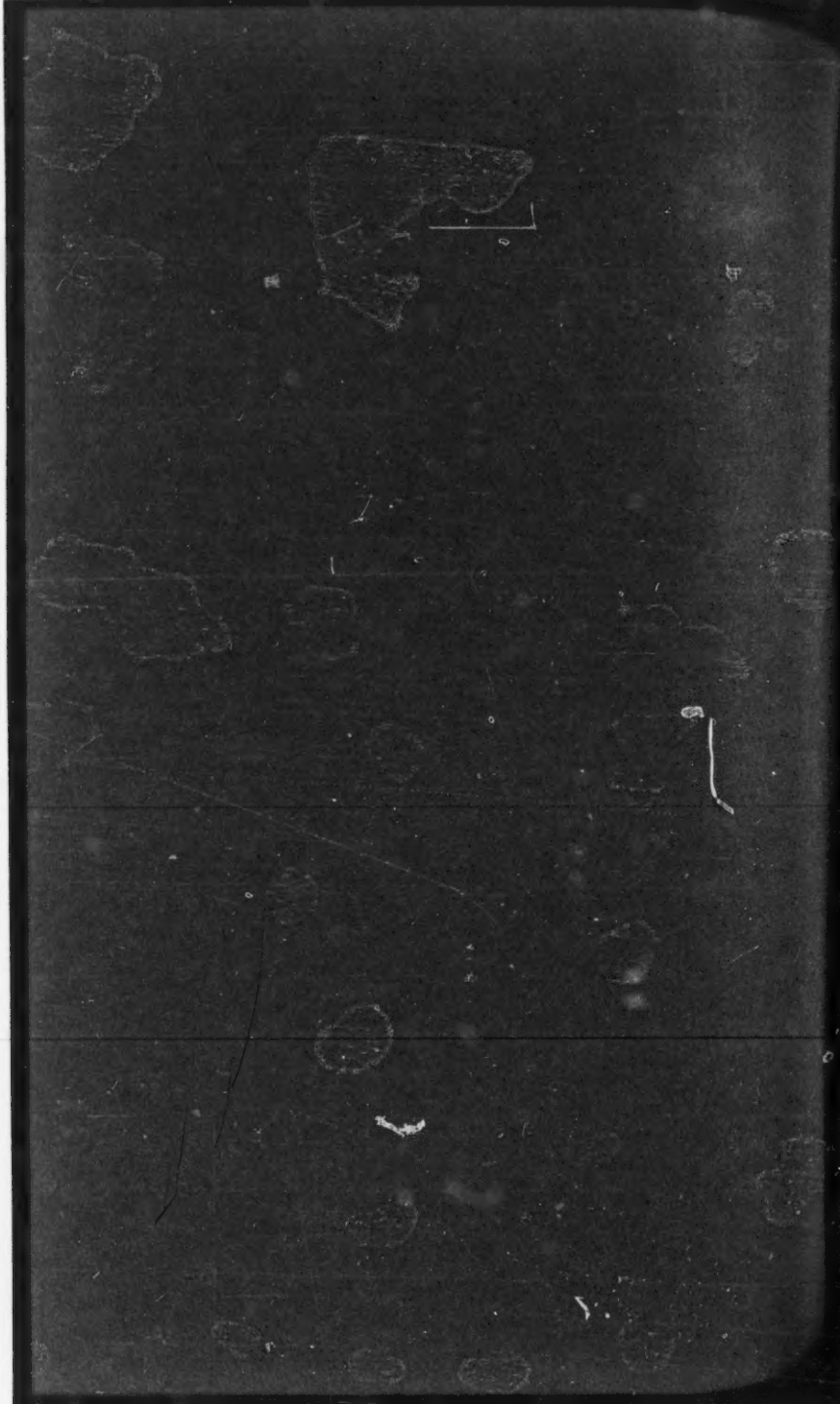

NO. 22, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

STATE OF SOUTH CAROLINA,

Plaintiff

versus

NICHOLAS deB. KATZENBACH,
Attorney General of
the United States,

Defendant

MOTION BY STATE OF ALABAMA FOR LEAVE TO INTERVENE AS A PARTY PLAINTIFF.

Comes the State of Alabama, acting by and through its Governor who as the Chief Executive Officer of said State is authorized to bring suit in the name of the State, and who is charged with the responsibility and duty of maintaining the authority and jurisdiction of the State of Alabama and of seeing that its laws are faithfully executed, and moves for leave to intervene in this cause, and as such intervener to be aligned as a party plaintiff in this cause to the end that the State of Alabama may adequately and properly present to this Court its claims that the Voting Rights Act of 1965 (PL 89-110) is unconstitutional as written and as applied to the State of Alabama and its citizens; for, although this applicant's position, vis-a-vis said Voting Rights Act, presents some questions of law in common with those asserted by the plaintiff in the original action, nonetheless the factual situations in South Carolina and Alabama are greatly different

and because of such difference the representation of Alabama's interests by South Carolina may be inadequate and result in findings, rulings or decisions that are binding upon yet adverse to the rights of Alabama and its citizens. Submitted herewith are proposed articles or claims upon which intervention is sought.

FRANCIS J. MIZELL, JR.
REID B. BARNES

Attorneys and Special Counsel for the State of Alabama acting by and through its Chief Executive Officer, Hon. George C. Wallace, as Governor of Alabama.

NO. 22 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

STATE OF SOUTH CAROLINA,

Plaintiff

v.

NICHOLAS deB. KATZENBACH, as
Attorney General of the United States,

Defendant.

ARTICLES AND CLAIMS OF INTERVENTION BY THE STATE OF ALABAMA

ARTICLE ONE

Intervener, as a Sovereign State, admits all the allegations contained in the complaint of South Carolina, the original plaintiff in this cause, and joins in the prayer of said complaint. It further joins in and adopts the brief of the plaintiff insofar as it relates to the constitutionality of the Voting Rights Act as written.

ARTICLE TWO

Because the State of Alabama is apprehensive that the main action in which it seeks to intervene is so limited and restricted in scope and factual context that an adjudication thereof would be inapposite, detrimental or adverse to the interests and rights of Alabama and its citizens, it is desirous

of an opportunity to present within the framework of this litigation contentions and claims in addition to those asserted by the State of South Carolina, as the original plaintiff herein.

ARTICLE THREE

The claims, contentions and issues urged by the State of Alabama for consideration and decision to those presented by South Carolina's original complaint herein are:

A. Does the Voting Rights Act of 1965 apply to Alabama?

B. Can Congress constitutionally suspend, supersede, or annul Alabama's constitutional requirement that a voter must be able to read and write an article of the Constitution in the English language?

C. Considering the fact that the total number of persons over the age of 21 years residing in Alabama was 1,834,378 according to the last (1960) United States census, and that approximately 200,000 of these were armed forces personnel and their adult dependents arising from assignments to armed forces installations in Alabama, viz: Redstone Arsenal at Huntsville, Gadsden Chemical Depot, Fort McClellan, Gunter AFB, Maxwell AFB, Craig AFB, 4th Corps Headquarters at Birmingham, Fort Rucker, and Brookley AFB (none of whom could acquire residence for voting in Alabama—see 17 Ala. Code 17—even though included as residents by the United States census); that as of November 1, 1964, 3,753 persons over 21 were serving felony sentences in Alabama penitentiaries, and were disqualified from registering; that the State Insane Asylum system had 6,942 persons committed therein over the age of 21 years as of November 1, 1964; and that 278,054 persons over 21 years of age in 1964 were illiterate, having less than a fourth grade education;

and that the total number of these persons disqualified and ineligible to vote for reasons totally unrelated to either race or color amounted to 488,749 thus leaving only 1,345,629 persons eligible to register and vote in Alabama, of whom some 688,147 or 51% voted in the presidential election of 1964, can it then be reasonably or truthfully said more than 50% of the elegible to vote population were denied the right to so do by reason of their race or color? It is clear the application of the Voting Rights Act to Alabama, was not brought about by discrimination.

D. The Director of the Bureau of Census, the Civil Service Commission and the Attorney General of the United States are abusing, misunderstanding and misapplying the laws of Alabama; or else are deliberately ignoring and violating the requirements of the Voting Rights Act; and, hence the Act is unconstitutional as applied by the agencies of the Government.

E. The Act was deliberately drawn to select certain States to come under it and to exclude other States.

F. The Act does not apply equally to the States of the United States especially with respect to the statutory formula used to invoke the provisions of the Act against Alabama.

G. The Act denies to the State of Alabama the right to subpoena and provide witnesses as a matter of right in that it requires said State to go to the District of Columbia, a distance of some 700 miles or more in order to have access to judicial relief.

H. The Act is not applicable to all States alike, as those States requiring literacy as a voter qualification on November 3, 1964, were required by the Act to vote a higher percentage of its residents in that election than those not requiring literacy.

I. The Act violates and conflicts with Articles 3 and 4 and the 5th Amendment of the United States in that it purports to delegate to and vest certain administrative offices authority to make rules and regulations, and the power to determine arbitrarily the applicability of the Act to Alabama without judicial review.

ARTICLE FOUR

In the State of Alabama the case of Bernard Reynolds, as Judge of Probate v. Nicholas Katzenbach, as Attorney General of the United States is pending before a three judge District Court in the Southern District of Alabama; the case of United States v. State of Alabama is pending before a three judge court in the Middle District of Alabama; and the case of the United States v. State of Alabama and Registrars of Macon County, Alabama is pending in the District Court in the Middle District of Alabama; and, in all of said cases the United States or its Attorney General has asked for affirmative action against the adverse parties therein pursuant to rights and penalties created by the Act, and hence said Act is due to be litigated and constitutionally questioned, not only as the same is written but especially as applied to the various factual situations in Alabama. Each of these cases provide areas for constitutional interpretations and determinations of the Act; and, in order that the full scope, effect and validity of the Act may be fully and properly considered, as well as ultimately determined by this Court, Alabama should be allowed to intervene as herein moved. It is respectfully suggested further action should be stayed in this case and Court until there has been an orderly and adequate consideration by the lower courts of the validity of the Act as written and now being applied by the Attorney General of the United States in Alabama; or in lieu thereof that a Special Master or Master be appointed to hear and report to this Court the

factual issues relevant to the application, enforcement and validity of the Act in Alabama, prior to an adjudication of the constitutionality vel non of the Act.

ARTICLE FIVE

By passage of the Act the United States Congress exercised powers not delegated to it, and which exercise of non-delegated power infringes upon rights reserved to the State; and to the people.

ARTICLE SIX

The Act as applied by the defendant is unconstitutional. Defendant is using said Act in an arbitrary and dictatorial manner by suspending and abrogating or failing to comply with State laws not inconsistent with the Act.

ARTICLE SEVEN

The defendant, as Attorney General of the United States, acting under the color of the Act has illegally and arbitrarily appointed Examiners in various counties in Alabama where: (1) Suits instituted by the said Attorney General to enforce the guarantees of the 15th Amendment were pending and court appointed referees were functioning without obtaining from the court concerned authorization for his appointment of said examiners; and (2) there had been no judicial finding of any past patterns of discrimination, and where the law of Alabama was then and is now being applied without any discrimination as to race or color.

ARTICLE EIGHT

Movant further urges as reasons for the granting of this motion to intervene the propositions asserted by the undersigned Special Counsel in their brief amicus curiae filed contemporaneously herewith, or which will be filed shortly hereafter.

For the reasons above noted, it is prayed this motion to intervene be granted and allowed and that a final hearing

or determination of this case be delayed, as hereinabove suggested, until there has been an adequate and orderly disposition of legal and factual issues pending in the various Federal Courts in Alabama where affirmative action is now pending at the request of the Government.

RESPECTFULLY SUBMITTED,

FRANCIS J. MIZELL, JR.
REID B. BARNES
Attorneys and Special Counsel for the State of Alabama acting by and through its Chief Executive Officer, Hon. George C. Wallace, as Governor of Alabama.

CERTIFICATE

I, Francis J. Mizell, Jr., one of the Special Counsel for the State of Alabama and duly qualified and admitted to practice in the Supreme Court of the United States, hereby certify that I have on this the ..... day of December, 1965, served a copy of the foregoing motion for leave to intervene upon Honorables Nicholas deB. Katzenbach, Attorney General; Thurgood Marshall, Solicitor General; and John Doar, Assistant Attorney General, all Attorneys for the defendant, Department of Justice, Washington, D. C., 20530; and also upon Honorables Daniel R. McLeod, Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina; David W. Robinson and David W. Robinson, II, Special Counsel for South Carolina, P. O. Box 1942, Columbia, South Carolina, Attorneys for the plaintiff; and to Honorables Richmond M. Flowers and Gordon Madison, Attorney General and Assistant Attorney General, respectively, of the State of Alabama, Montgomery, Alabama, by mailing each of them a copy, postage prepaid, to their aforesaid addresses.

FRANCIS J. MIZELL, JR.
Of Counsel

JOINING IN THIS BRIEF.

Hon. Bert T. Kobayashi, Attorney General of Hawaii.

Hon. John J. Dillon, Attorney General, Theodore D. Wilson, Assistant Attorney General, and John O. Moss, Deputy Attorney General, of Indiana.

Hon. Lawrence F. Scalise, Attorney General of Iowa.

Hon. Robert C. Londerholm, Attorney General of Kansas.

Hon. Richard J. Dubord, Attorney General of Maine.

Hon. Thomas B. Finan, Attorney General of Maryland.

Hon. Frank J. Kelly, Attorney General and Robert A. Derendoski, Solicitor General, of Michigan.

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Hon. Arthur J. Sills, Attorney General of New Jersey.

Hon. Louis J. Lefkowitz, Attorney General of New York.

Hon. Charles Nesbitt, Attorney General, and Charles L. Owens, Assistant Attorney General, of Oklahoma.

Hon. Robert Y. Thornton, Attorney General of Oregon.

Hon. Walter E. Alessandroni, Attorney General of Pennsylvania.

Hon. J. Joseph Nugent, Attorney General of Rhode Island.

Hon. John P. Connarn, Attorney General of Vermont.

Hon. C. Donald Robertson, Attorney General of West Virginia.

Hon. Bronson C. LaFollette, Attorney General of Wisconsin.

Hon. William Maynard, Attorney General of New Hamphire

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 22, ORIGINAL.

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

NICHOLAS DE B. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant.

BRIEF OF THE ATTORNEY GENERAL OF MASSACHUSETTS, AMICUS CURIAE.

Interest of These Amici Curiae.

The above-named Attorneys General join in this brief *amicus curiae* in support of the Voting Rights Act of 1965. The purpose of the Act is to control the *discriminatory* use of literacy and like tests and devices in those few states and localities where they are used as vehicles for preventing Negroes from voting,[1] and to assure that all citizens may exercise the right to vote on equal terms.

[1] Some of the States joining herein have literacy and like tests themselves; some do not. New York joins in this brief and argument only as to the applicability of the Fifteenth Amendment and specifically reserves the question of the applicability of the Fourteenth Amendment to the cases arising under section 4(e) of the

The above-named Attorneys General are convinced that the Act does not offend the Constitution, and that, further, it merits the support of all who believe that the day has passed when denial by a state of the most basic rights inherent in a United States citizen can be tolerated.

At issue is Congress's power to cope with an enforcement problem that has beset it since adoption of the Fifteenth Amendment. By ratifying the Fifteenth Amendment the states determined beyond dispute that no state should have the power to deny or abridge the rights of citizens of the United States to vote because of race or color. Section 2 of the Fifteenth Amendment expressly gave Congress power to enforce its provisions by "appropriate legislation." Yet to this day the provisions of the Fifteenth Amendment have remained a dead letter in a few states; and Negroes in those states have been and still are denied the right to vote, because of their race.

The outcome of this case will determine whether at long last the Fifteenth Amendment is to be given practical effect with adequate, timely methods of enforcement, as opposed to those means which history has proved to be ineffective, too little, and too late.

The above-named Attorneys General believe that Congress may and must take appropriate steps to ensure to Negro citizens everywhere their constitutional right to vote on terms the same as whites. Those who join in this brief do not doubt that each state has the right to establish the qualifications of voters. They would assert and defend such right against improper encroachment. But we are a nation, not just a group of states—and a state's power to determine the qualifications of voters must be exercised in harmony with the standards of the Fifteenth Amendment.

Voting Rights Act of 1965 (*Morgan* v. *Katzenbach*, D.C. D. Col. Nov. 17, 1965; and *United States* v. *County Board of Election of Monroe County*, D.C. W.D. N.Y., Dec. 8, 1965).

The Voting Rights Act of 1965 is intended to abolish the well-documented practice in a few states of using literacy and like tests and devices, *not* to test literacy or maintain reasonable and uniform minimum standards for all voters, but to give local registrars a legalized pretext for turning down all or most Negroes while registering whites. After it became overwhelmingly clear that existing remedies, no matter how vigorously pursued, were inadequate, Congress had no alternative but to frame new legislation to cope with the situation.

Th Voting Rights Act of 1965 reflects a rational, appropriate and measured approach to the problem. It (1) provides for suspending local literacy and like tests and devices in those few states and localities where less than fifty per cent of persons of voting age were actually registered on November 1, 1964; and (2) it provides for federal examiners to register the victims of discrimination in areas where local registrars refuse to register qualified Negroes. Also, it provides for judicial review and for termination of the Act's application wherever discrimination is disproved.

The Act may not reflect the only possible approach. Opinions may differ as to the wisdom of its every detail. But overall, as said, it reflects a rational, appropriate and measured approach to a most difficult problem. It calls for no greater intrusion of federal responsibility than is warranted in the light of experience. As the former Solicitor General of the United States said about the Act:

> "Whether the shift of responsibility [from state to federal] proves great or small in the end depends entirely upon the willingness of the person affected now to conform to the fifteenth amendment's declaration that the right of a citizen to vote shall not be denied or abridged on account of race or color. The bill will have no effect upon the respective functions

of state and federal governments—it will not bring one iota of federal intervention—in those states and localities in which the fifteenth amendment is made a living reality as the Constitution directs. . . ."[2]

Each State joining in this brief has a substantial interest in the ending, within sister states, of a denial of fundamental constitutional rights. This nation's identity and purpose derive from a common allegiance to the Constitution. Denial by any state, solely because of race or color, of a citizen's right to vote affronts the principles which make us one nation. Such denial is a source of damage to every other state.

Today, residents of one state frequently move to another, carrying with them training and attitudes from their former residences. It is of concern to the States joining herein that newly arrived Negro residents will not come from a background of systematic deprivation of their constitutional and political rights. Quite apart from the injustice that such citizens will have suffered, they will be poorly prepared to participate in the democratic process at their new residence. Furthermore, when, under color of law, any state denies to Negroes the right to vote, its action must inevitably lend a facade of respectability to the misguided efforts of those persons in other states who might desire to hamper the efforts of Negro citizens to exercise their legal and constitutional rights. In this fashion the legally established discrimination practiced by a few states serves throughout the country to retard national progress toward full equality and racial harmony. Every state, therefore, is interested in seeing that the rights conferred by the Fourteenth and Fifteenth Amendments are uniformly effective throughout the nation.

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[2] Cox, "Constitutionality of the Proposed Voting Rights Act of 1965," 3 Houston L. Rev. 10.

In addition, our nation's posture abroad suffers if solemn constitutional commitments are in default. Opponents in the international arena use the denial of rights in any state to mischaracterize our entire democracy. In this further respect, the denial of rights in a few states is injurious to all.

And, of course, the composition of our federal government—the men who are elected to national office and our Senators and Representatives—is determined by the composition of the electorate. In a state where less than half the eligible voters are registered, enrollment of now unregistered voters could result in substantial changes both in the individuals representing the state and in the policies they pursue. Such changes could have important effects on national policies influencing all the states. It is plainly of significance to all the states whether the make-up of the Congress reflects all the electorate in certain states or just the white part of it.[3]

For the foregoing reasons, the States joining herein as *amici curiae* have vital interests in this case. It is their deep conviction that the Voting Rights Act of 1965 is not only constitutional but reflects needed action by Congress to secure constitutional rights essential to the vitality and health of the nation.

Summary of Argument.

The Fifteenth Amendment provides that no state shall have power to deny or abridge the rights of citizens of

[3] See also the second paragraph of the Fourteenth Amendment, which specifically provides for a reduction in Congressional representation in the case of states which deny adult citizens the right to vote. This provision clearly gives every other state a direct interest in the extent to which a sister state may discriminate in voter registration.

the United States to vote because of race or color. Congress is given power by section 2 of the Fifteenth Amendment to enforce its provisions by appropriate legislation.

While power to set voting qualifications rests with the states, that power is plainly limited by the guaranties of the Fifteenth Amendment as well, also, as of the Equal Protection clause of the Fourteenth Amendment. Qualifications used to violate these guaranties have been consistently rejected by this Court.

The Voting Rights Act of 1965 is a valid exercise by Congress of its power to enact appropriate legislation to enforce the provisions of the Fifteenth Amendment.

The appropriateness of this Act can be seen by reference to the long history that preceded it and the peculiar problems that it was designed to overcome.

First, the evidence is overwhelming that in certain states there has been and still is widespread, indeed almost universal, calculated denial of Negro voting rights.

Second, the disenfranchisement has been accomplished by use—or rather misuse—of literacy and other tests and devices by local registrars. Such tests and devices (which would ordinarily be legal if equitably and fairly applied to Negroes and whites alike) provide the pretext for rejecting Negroes while registering whites.

Third, prior voting-rights legislation, providing mainly for reinforced judicial, case-by-case remedies, has simply been inadequate to correct the situation.

Faced with this history, Congress was compelled to fashion legislation which would provide for the suspension of tests and devices in those few states where they were being used overtly to disenfranchise Negroes. The Voting Rights Act of 1965 accomplishes this result on a rational basis.

There is precedent for legislation, such as the Act, which uproots otherwise proper practices that have become "infected with abuse," instead of merely attempting to erase

their improper features. In the present case, years of experience, and volumes of testimony and evidence, indicated the impossibility of securing Negro voting rights in certain states without suspending for a period the tests and devices being used to disenfranchise Negroes. That such tests and devices are legal if uniformly administered does not prevent Congress from facing up to their systematically illegal use in some states—and from acting realistically in those states.

The Voting Rights Act of 1965 provides ample safeguards for exempting states and localities with literacy and like tests which are not administered so as to offend the Fifteenth Amendment. The Act is not a bill of attainder, an ex-post-facto law, or other inequitable type of law.

In the light of the facts and circumstances before Congress, it is difficult to conceive of much different—certainly no less encompassing—legislation which would have accomplished Congress's valid aims. If South Carolina's contentions were to prevail, Congress would be placed in the position of being impotent to enforce the guaranties of the Fourteenth and Fifteenth Amendments—a position which the states, no less than the federal government, would find intolerable.

Argument.

I. Congress has Power to Enact Appropriate Legislation Precluding the States from Denying the Right to Vote on the Basis of Color.

A. Although a State has Power to Determine the Qualifications for Voting, Such Power may Not be Used to Violate the Fourteenth and Fifteenth Amendments.

The Fifteenth Amendment provides that no state shall have power to deny or abridge the rights of citizens of the United States to vote because of race or color. A state's

power to determine qualifications for voting[1] is not absolute, but is limited by the Fifteenth Amendment as well as by the Equal Protection clause of the Fourteenth Amendment. Thus Delaware's early attempt to restrict the franchise to whites fell before the Fifteenth Amendment,[2] as did "grandfather clauses" in Oklahoma[3] and Maryland.[4] Attempts to make race a qualification for voting in primary elections have been struck down under the Fourteenth and Fifteenth Amendments. *Smith* v. *Allwright*, 321 U.S. 649. *Nixon* v. *Condon*, 286 U.S. 73. *Nixon* v. *Herndon*, 273 U.S. 536. ". . . [T]he right of suffrage . . . is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 51.

Literacy tests and similar requirements are not exempt from the Fifteenth Amendment. In *Lassiter* v. *Northampton County Board of Elections, supra*, where a North Carolina literacy test was sustained against the contention that "on its face" it violated the Fifteenth Amendment, the Court stated that "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53. The Court, which in 1949 affirmed a decision annulling Alabama's literacy test on the ground that it was "merely a device to make racial discrimination easy,"[5] in 1965 voided one of Louisiana's literacy tests. *Louisiana* v. *United States*, 380 U.S. 145.

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[1] U.S. Const. art. I, § 2; Amendments X, XVII.

[2] *Neal* v. *Delaware*, 103 U.S. 370.

[3] *Guinn* v. *United States*, 238 U.S. 347.

[4] *Myers* v. *Anderson*, 238 U.S. 368.

[5] *Ibid.*; see *Schnell* v. *Davis*, 336 U.S. 933, affirming 81 F. Supp. 872 (S.D. Ala. 1949).

As these cases have made clear, the States' right to set voting qualifications, exercised "wholly within the domain of state interest . . . is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347. Clearly, then, the States, in exercising their power to determine the qualifications of their voters, may not use otherwise legitimate tests to deprive certain of their citizens of the right to vote.

B. Congress has the Power to Enforce a Negro Citizen's Constitutional Voting Rights by "Appropriate Legislation."

The last sections of the Fourteenth and Fifteenth Amendments give Congress the power to enforce each of these articles by "appropriate legislation." This language was clearly meant to enlarge the power of Congress and to provide for congressional enforcement of the substantive constitutional rights. *Ex parte Virginia*, 100 U.S. 339, 345. Congress's broad powers to enact legislation designed to prevent the denial of the right to vote because of race or color have been sustained in a number of cases. *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963); aff'd, 380 U.S. 145. See *United States* v. *Manning*, 215 F. Supp. 272, 288, n. 38 (W.D. La. 1963); *Larche* v. *Hannah*, 177 F. Supp. 816, 821 (W.D. La. 1959); aff'd, 363 U.S. 420. The Civil Rights Acts of 1957[6] and 1960[7] were upheld.

[6] 71 Stat. 634 (1957), 42 U.S.C. §§ 1971, 1975-1975e, 1995 (1964). The constitutionality of the Act was upheld by the Court in *United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Raines*, 362 U.S. 17; *Larche* v. *Hannah*, 363 U.S. 420.

[7] 74 Stat. 86 (1960), 42 U.S.C. §§ 1971(c), (e), 1974-1974e, 1975d(h) (1964). The constitutionality of this Act was upheld by

This Court has defined the scope of congressional power as follows:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-346.

In construing the powers of Congress under the analogous "necessary and proper" clause[8] the Court has recognized that Congress must necessarily have considerable flexibility in the selection of appropriate means. See *Katzenbach* v. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel, Inc.*, v. *United States*, 379 U.S. 241; *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 420 (1819).

In the present instance Congress has fashioned reasonable and practical means for dealing with longstanding methods employed by certain states to deny Negroes the right to vote, based on misuse of literacy tests and like devices. To understand the appropriateness of Congress's action it is necessary to examine into the history of these abuses and the circumstances with which Congress was confronted. To that history and to those circumstances we now turn.

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the Court in *Louisiana* v. *United States*, 380 U.S. 145; *United States* v. *Mississippi*, 380 U.S. 128; *Alabama* v. *United States*, 371 U.S. 37 (per curiam).

[8] U.S. Const. art. I, § 8.

II. Congress Reasonably Determined on the Basis of Overwhelming Evidence that Negroes in Several States and Political Subdivisions were being Systematically Deprived of the Right to Vote, and that Literacy and Other Tests and Devices were the Chief Means being Used to Accomplish that Result.

Literacy, interpretation and like examinations as a qualification for voting first made their appearance in the Southern states in the 1890's with the purpose, usually explicitly admitted in legislative debate, of disenfranchising the Negro so far as possible.[1] Of Louisiana's tests a federal District Court recently said:

> "These are rooted in the State's historic policy and the dominant white citizens' firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote." *United States* v. *Louisiana,* 225 F. Supp. 353, 363 (E.D. La. 1963); aff'd, 380 U.S. 145.

The use of the subjective nature of literacy and like tests as a means to bar Negroes from voting has been the most durable of a long series of schemes to deprive colored citizens of their Fifteenth Amendment rights. See *United States* v. *Reese,* 92 U.S. 214; *Ex parte Yarbrough,* 110 U.S. 651; through the "grandfather clause" cases, *Guinn* v. *United States,* 238 U.S. 347; *Myers* v. *Anderson,* 238 U.S. 368; and the "white primary" cases, *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S.

[1] For the history of the Louisiana voting qualification tests, and those of other states in general, see Judge Wisdom's careful study in *United States* v. *Louisiana,* 225 F. Supp. 353 (E.D. La. 1963); aff'd, 380 U.S. 145. See also Cox, "Constitutionality of the Proposed Voting Rights Act of 1965," 3 Houston L. Rev. (1965), 2-3.

461; the resort to procedural hurdles, *Lane* v. *Wilson*, 307 U.S. 268; to racial gerrymandering, *Gomillion* v. *Lightfoot*, 364 U.S. 339; to improper challenges, *United States* v. *Thomas*, 362 U.S. 58; and, finally, the discriminatory use of tests, *Schnell* v. *Davis*, 336 U.S. 933; *Alabama* v. *United States*, 371 U.S. 37; *Louisiana* v. *United States*, 380 U.S. 145.

Aware of this history, Congress established, in 1957, the United States Civil Rights Commission, with broad investigative powers, and directed it to study the extent and circumstances of voting discrimination.

The Commission's studies, taken in conjunction with evidence appearing in litigation, and other reports, confirmed the existence of a widespread and determined effort in certain states to keep Negroes from registering and voting. The evidence of this was overwhelming.[2] In 1961 the Civil Rights Commission concluded that in at least one hundred and twenty-nine counties in ten states, where Negroes constitute more than 5 per cent of the population twenty-one years old and over, less than 10 per cent of those ostensibly eligible were in fact registered to vote. In twenty-three of these counties in five states, indeed, *no* Negroes at all were registered. The inference was unavoidable that some affirmative deterrent was at work, especially in those counties where none were registered.[3]

The Commission also found that literacy and similar tests were the primary means used to prevent Negroes from voting. In 1959 it reported that—

> "In its investigations, hearings, and studies, the Commission has seen that complex voter qualification

[2] See I 1961 United States Commission on Civil Rights Report especially, and also the appendices to H.R. Rep. No. 439, 89th Cong. 1st Sess. (1965).

[3] I 1961 United States Commission on Civil Rights Report, 111-112.

tests, including tests of literacy, education, and 'interpretation' have been used and may readily be used arbitrarily to deny the right to vote to citizens of the United States. *Most denials of the right to vote are in fact accomplished through the discriminatory application and administration of such State laws.* The difficulty of proving discrimination in any particular case is considerable. It appears to be impossible to enforce an impartial administration of the literacy tests now in force in some States, for where there is a will to discriminate, these tests provide the way."[4] (Emphasis added.)

The subjective nature of many of these examinations constitutes their chief value to those who wish to exclude Negroes from the rolls. Wide discretion is often vested in the registrars who evaluate the test results. Review of their determinations is almost impossible. In hearings before the Senate Subcommittee on Constitutional Rights it was testified that "Applicants . . . might have to write long or short statements, interpret complex or simple test materials—all to the satisfaction of the examiner. In the last the opportunities for discrimination are endless . . ."[5] Thus, in a county in one state, for example, a federal district judge found that six Negro applicants (two with master's degrees, three with bachelor's degrees and one with a year of college training) were denied the right to vote on the specious ground that they could not read

[4] 1959 Report, by the United States Commission on Civil Rights: Proposal for a Constitutional Amendment to Establish Universal Suffrage, 144-145.

[5] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong. 2d Sess., on S. 480, S. 2750 and S. 2979, pp. 261-262.

intelligibly or write sections of the state constitution.[6] White applicants, however, have been assisted in completing the forms, and sometimes they have been registered without taking any test.[7]

Also, the Courts have found discrimination by use of qualifying examinations for voting. In *United States* v. *Alabama,* 192 F. Supp. 677 (M.D. Ala. 1961); aff'd, 371 U.S. 37, the District Court found that "The double standard in receiving and processing applications of Negroes and whites has been applied by the Board of Registrars during the past five years in at least six different phases of the registration processes." 192 F. Supp. at 679-680. The decision is virtually a textbook of methods of depriving Negroes of their voting rights, without appearing to do so.[8]

Thus Congress was plainly entitled to conclude, as stated in the Report of the House Committee on the Judiciary:

> "The facts are clear. In widespread areas of several states tests and devices, as defined in this bill,

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[6] *Ibid.*

[7] *Ibid.* 261-262.

[8] The six phases alluded to were (1) the order of accepting applicants (whites were chosen first, no matter when they arrived), (2) the assistance rendered to white applicants (certain whites had been given assistance by the registrars, whereas Negroes of high-school and college education were rejected repeatedly for minor errors, and had not been given any aid); (3) the writing test (Negroes invariably wre required to copy a provision of the Federal Constitution—often article II; whites were given an easier passage, or none at all); (4) grading of applications of Negroes who were rejected because of formal or inconsequential errors, while no whites were rejected for the same errors; (5) the failure to mail registration certificates to Negro applicants (thus the Negroes had no proof of their right to vote, but, if it came to court, the fact of registration would suddenly be "discovered"—see *Mitchell* v. *Wright,* 69 F. Supp. 698 (M.D. Ala. 1947)); (6) the failure to notify rejected applicants (a practice operating only as to Negroes, hampering their reapplication).

have been effectively and repeatedly used to deny or abridge the right of Negroes to vote.'"[9]

The finding that Negroes in several states and political subdivisions were systematically deprived of the right to vote, and that literacy and like tests and devices were the principal means to reach this result, was not only proper, but inescapable.

III. Congress Reasonably Concluded in the Light of Extensive Experience that Case-by-Case Enforcement of Voting Rights under Previous Legislation could Not Cope with the Scale and Dimension of the Problem in Certain States.

A. Prior Voting Rights Legislation was Limited in Scope and Required Case-by-Case Enforcement.

The previous Voting Rights Acts of 1957, 1960 and 1964 enlarged and strengthened the legal remedies available to help individuals illegally denied the right to vote.

Thus the 1957 Act provided for judicial enforcement at the suit of the Attorney General of the right to vote. But the Civil Rights Commission found that "the results of the Act in the field of voting seem disappointing." In 1959 the Commission noted that discriminatory denials of the vote were serious and widespread. The Civil Rights Division had instituted three actions under the new section 1971(c), and had not been successful in any.[1] Partially as a result of this pessimistic report, the 1960 Act was passed.

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[9] H.R. Rep. No. 439, 89th Cong. 1st Sess. 12-13.

[1] I 1961 United States Commission on Civil Rights Report, 75.

Title III of the 1960 Act declared voting records public and required their preservation for a period of twenty-two months following any general or special election. The Attorney General was given the power to secure such records. This provision resulted in complex litigation. See *Alabama* v. *Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960); aff'd, *sub nom. Dinkens* v. *Attorney General*, 285 F. 2d 430 (5th Cir. 1961); cert. den. 366 U.S. 913; *United States* v. *Association of Citizens Councils of Louisiana*, 187 F. Supp. 846 (W.D. La. 1960). Title VI, providing for federal voting referees, was a significant innovation, but a long way from securing the right to vote to Negroes. The machinery for appointing a referee under this title was complicated and time-consuming.

First, the Government had to file a suit under section 1971(a) and (c) and obtain a Court order to the effect that "a person has been deprived on account of race or color" of the right to vote. Then the Court must find that "such deprivation was or is pursuant to a pattern or practice." For at least a year after such a finding, any person in the area of the race found to be discriminated against may apply for an order entitling him to vote. To get such an order he must prove that (*a*) he is qualified under state law to vote, and (*b*) he has since such finding by a Court been (1) deprived of or denied the opportunity to register to vote or otherwise to qualify to vote, or (2) found not to be qualified to vote by any person acting under color of law. After these findings are made, the Court may hear the applicant himself, or appoint referees, who are empowered to act in a fashion similar to a master appointed under Rule 53(c) of the Federal Rules of Civil Procedure. The time-consuming nature of such a process and the difficulties of proof are apparent.

/ Thus the Civil Rights Commission concluded that "These successes (under the 1957 and 1960 Acts), however, do not

indicate that current legislation, even with continued vigorous enforcement, affords a prompt solution to the existence of discriminatory denials of the right to vote on account of race or color. The Government, under present laws, must still proceed slowly—suit by suit, county by county . . . There is no widespread remedy to meet what is still widespread discrimination."[2]

Title I of the 1964 Civil Rights Act expedited suits by prohibiting rejection of applications for immaterial error in filling out forms. It also barred the use of oral literacy tests, and established a rebuttable presumption of literacy flowing from completion of six grades in any school recognized by the state.

But while of value, the 1964 legislation still required judicial enforcement by the traditional case-by-case approach.

B. The Case-by-Case Approach Proved to be Entirely Inadequate to Deal with the Magnitude of the Problem.

Congress, upon examination of results under the previous Voting Rights Acts, reasonably concluded that "experience has shown that the case-by-case approach will not solve the voting discrimination problem."[3] The sheer magnitude of the problem defied a case-by-case solution.

The ineffectiveness of the litigative approach can be seen in the history of voting suits, particularly in the Fifth Circuit.[4] The many opportunities for delay available in any voting-rights lawsuit have all been employed at one point or another by Courts not entirely sympathetic to the vindication of Negroes' rights. For example, the doctrine of abstention has been used extensively. This doctrine post-

[2] I 1961 United States Commission on Civil Rights Report, 100.

[3] Sen. Rep. No. 162, part 2, 89th Cong. p. 6.

[4] See generally, 73 Yale L.J. 90 (1963).

pones litigation in a three-judge District Court until potentially controlling questions of state law have been answered by the state judiciary. Several years may be required to obtain a conclusive ruling if the issue is taken to the state Supreme Court. See *Bailey* v. *Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961); *vacated per curiam*, 369 U.S. 31 (1962) (dealing with a nonvoting civil-rights issue), and *Lassiter* v. *Taylor*, 152 F. Supp. 295 (E.D. N.C. 1957), where the District Court ordered abstention in order that the state Court might consider the challenged statute (a literacy test) "in the light of the provisions of the State Constitution." 152 F. Supp. at 298. See also 73 Harv. L. Rev. 1358, 1364-1365.

Substantial opportunities for delay arise from postponements prior to and during the trial, and from the district judge's control over the period of time between completion of trial and hearing and rendering of his decision. See *Anderson* v. *City of Albany* (No. 20501, 5th Cir. July 26, 1963), in which the judge did not render a decision in two of the cases until nine months after the consolidated hearings. Also see *United States* v. *Lynd*, 301 F. 2d 818, 821 (5th Cir. 1962); *In re Coleman*, 208 F. Supp. 199 (S.D. Miss. 1962); aff'd, *per curiam*, *Coleman* v. *Kennedy*, 313 F. 2d 867 (5th Cir. 1963); cert. den. 373 U.S. 950 (1963) (a demand stalled for more than a year by judicial delays and stays); and see cases cited in 73 Yale L.J. 90, 96.

Delays of the sort mentioned above are compounded when the lower Court errs, requiring appeal, reversal and remand for retrial. Perhaps the most striking example of such "error" may be found in a school segregation case, *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425 (5th Cir. 1963), nine years after *Brown* v. *Board of Education of Topeka*, 347 U.S. 483. Here the district judge denied the requested injunctive relief "solely

on the basis" of a factual finding that, although segregation existed, integration was injurious to members of both races. 318 F. 2d at 427. See also *Kennedy* v. *Bruce,* 298 F. 2d 860 (5th Cir. 1962), which was a suit to require the production of county voting records. There the judge rendered decisions, without opinion, denying the request about sixteen months after it was made. 298 F. 2d at 862. For a recent case in which the findings would seem to have been contradicted by the facts, see *United States* v. *Duke,* 332 F. 2d 759 (1964).

And even after the decision of the District Court has been reversed and remanded, it has still other means of slowing down the redress of constitutional wrongs. Four stay orders were used in *Meredith* v. *Fair,* 7 Race Rel. L. Rep. 741, 742-745 (5th Cir. July-August, 1962). The district judge may extend the period prior to framing an injunction to several months, rather than the several weeks normally required. Or the district judge may enter a decree "misinterpreting" the opinion from the Court of Appeals, and delay full relief while modification is sought. The suit may ultimately be abandoned through sheer fatigue of the petitioners. See *Meredith* v. *Fair, supra,* and comments in 73 Yale L.J. 90, 98.

The failure of case-by-case enforcement under prior voting legislation to bring about substantial improvement in the problem as a whole has been shown by statistical results. For example, in Mississippi in ten years the percentage of voting-age Negroes who were on the rolls had crawled from 4.4 per cent to 6.4 per cent (and from 1961 to 1964, the period of greatest litigative activity, it had risen from 6.2 per cent to 6.4 per cent). In Louisiana the registration of Negroes appears to have increased by only one tenth of 1 per cent between 1958 and 1965.[5]

[5] Senate Hearings, Report No. 162, part 2, p. 6. See Christopher, "The Constitutionality of the Voting Rights Act of 1965," 18 Stanford L. Rev. 7-9.

Thus Congress's decision that a more comprehensive approach was needed if Negroes were ever to be given their rights under the Fourteenth and Fifteenth Amendments was not only proper but inescapable.

IV. In the Light of the Magnitude and Nature of the Problem, and its Failure to Yield to Past Case-by-Case Procedures, the Comprehensive Approach of the Civil Rights Act of 1965 is a Reasonable and Appropriate Exercise of Congressional Power.

A. The Presumption Created by Section 4(b) of the Voting Rights Act of 1965 is Reasonable.

The main feature of the Voting Rights Act of 1965 is to substitute a rebuttable administrative presumption of discrimination in an entire state or subdivision thereof for proof of the same case by case (§ 4(b)). The presumption then results in suspension of all literacy and like tests and devices, and permits federal voting examiners to register voters if local registrars continue to discriminate. The rebuttable presumption arises wherever fewer than 50 per cent of the population twenty-one years of age and older has not registered or voted in the 1964 presidential election, and wherever there is in effect a "test or device."[1]

Congress had ample evidence justifying the legislative formula that invokes this presumption. The evidence indicated that voting discrimination was widespread in all but one of the seven states which would fall within the formula. Judicial findings of violations of the Fifteenth Amendment through the use of tests and devices in most of the included states and subdivisions were buttressed by findings of a "pattern or practice" of discrimination. No voting discrimination case initiated by the Justice De-

[1] Section 4(b).

partment within the included states and subdivisions had been concluded without a finding of discrimination. In the counties in Alabama, Mississippi and Louisiana where suits had been instituted, a pattern emerged of a substantial non-white voting-age population, a high percentage of white registration, a very low percentage of non-white registration, and a low voter turnout in the presidential election of 1964. In the six southern states which would be included, a general public policy of racial segregation was evidenced by state statutes regarding travel, education and hospital facilities. Only two states, besides those six, having "tests and devices" also had laws indicating policies of racial discrimination. In one of these, North Carolina, thirty-four counties would apparently be covered by the formula, and in the other, Delaware, recent legislation reflects abandonment of legalized discrimination.

On the other hand, in most states with tests or devices where *more* than 50 per cent of the voting-age population voted in 1964, there are statutes affirmatively outlawing racial discrimination. Congress justifiably concluded that, since those states expressed a public policy against racial discrimination, it was reasonable to assume that voting discrimination on account of race did not exist in quantity.

There are a few areas, of course, covered by the mechanical formula of section 4 which plainly do *not* discriminate (for example, Aroostook County, Maine), but they are afforded the opportunity to exempt themselves by Court action,[2] and, indeed, the Attorney General is directed to consent to entry of a judgment exempting such a state or locality (§ 4(a), (d)).

In view of the evidence before it, Congress could appropriately find, as it did, that, where these two factors (less than 50 per cent registered or voting, and a literacy or like

[2] H.R. Rep. No. 439, 89th Cong. p. 14.

test) are present, there is good reason to presume, subject to rebuttal, that racial discrimination exists.[3]

Inevitably, a mechanical formula of this nature may fall short of perfection in a minority of the circumstances to which it applies. Some areas that discriminate will escape. A few that do not may conceivably be put to the trouble of legal proceedings. But there is a rational connection between the presumption and the "triggering" facts (viz., less than 50-per-cent registration); means for avoiding the presumption are provided; and years of experience demonstrate that only legislation of this scope can deal realistically with the problem.

Moreover, in analyzing the reasonableness of the presumption, one must weigh the burden that it imposes against the greater right that is at stake. The most that can happen to a state is to lose, temporarily, its right to establish tests and devices as a qualification to vote. In return for this, the right of its citizens to vote without discrimination is vindicated.

It should be repeated that the Act's restrictions do not apply if a state or political subdivision (although otherwise within the formula) can show that it has not discriminated against Negro voting applicants in the last five years. The burden is a reasonable one; it requires a showing that, for the preceding five years, no test or device has been used to deny the right to vote on account of race or color, and that any incidents of discrimination have been few in number, promptly corrected, and are unlikely to recur in the future.[4] The burden of proof falls on the

[3] H.R. Rep. No. 439, 89th Cong. 1st Sess. 13. Sen. Rep. No. 162, part 3, p. 13.

[4] Sections 4(a) and (d). The fact that no declaratory judgment may be obtained if, within the last five years, a court has entered a judgment holding that the state or subdivision has engaged in the discriminatory use of tests simply is a form of col-

proper party, inasmuch as the greatest part of the relevant evidence is in the hands of the states or subdivisions involved.

Clearly, the presumption under section 4 of the Act is sufficiently reasonable in the light of past experience and the problem at hand to fall within the authority granted Congress to enact "appropriate legislation" to enforce the provisions of the Fourteenth and Fifteenth Amendments.

B. There is Precedent for Suspending Otherwise Proper Tests and Devices where they have Become Infected with Abuse.

The suspension for a period of time of otherwise proper literacy and like tests and devices in states and subdivisions where they are being used for illegal purposes does not exceed Congress's power. There is precedent for legislation which uproots otherwise legal practices that have become so infected with abuse that it is impractical simply to isolate and erase their improper features.

Thus, for some years the National Labor Relations Board has disestablished company unions instead of merely enjoining company domination or interference. This practice was upheld in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250, per Roberts, J.:

> "As pointed out in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, disestablishment of a bargaining unit previously dominated by the employer may be the only effective way of wiping the slate clean and affording the employes an opportunity to start afresh in organizing for the adjustment of their relations with the employer."

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lateral estoppel; the political entity cannot now claim that it has not done what it has already been found to have done.

In both situations the interest of innocent persons may be subordinated for a time to the securing of the larger interest—there the interest of employees who might wish to support the union theretofore dominated was subordinated; here that of the literate voters who may object to possibly illiterate voters sharing in the suffrage.

In *James Everard's Breweries* v. *Day,* 265 U.S. 545, Congress was permitted to prohibit the prescription of malt liquors for medical purposes, and was not limited to regulating the misuse of the prescriptions. The Court said, at pages 558-559:

> ". . . Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished . . ."

In the last analysis, the appropriateness of any legislation depends on the peculiar facts and circumstances with which Congress must deal. Seldom has Congress had a longer history or more conclusive documentation upon which to base its action. The failure of earlier case-by-case attempts, and the fact that so little has been accomplished over so long a period, underscored the necessity for the more comprehensive action which Congress finally took. (Compare *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, pointing out the decisive effect of new, or newly disclosed, facts on an earlier constitutional decision.)

Whatever the Court's judgment might have been as to the appropriateness of the Act had it been enacted, say, in 1871, there can be little doubt as to its appropriateness nearly a century later in the light of intervening experience and the facts and evidence at hand.

V. The Act is Not a Bill of Attainder, Ex-Post-Facto Law, or Other Type of Unreasonable or Improper Legislation.

Arguments that the Act is a bill of attainder, or an *ex post facto* law, and that it infringes upon the states' rights to equal treatment, deserve summary treatment. There is nothing in the evils against which the bill of attainder and *ex post facto* law clause[1] are directed, or in the cases which have construed it, to indicate that the protection was designed to apply to the states. As to the states' rights to equal treatment, *Coyle* v. *Smith*, 221 U.S. 559, makes clear that this "equal footing" doctrine applies only to the basis on which a state is admitted to the Union.

Even if states were entitled to protection against bills of attainder and *ex post facto* laws, the Act does not fall into either category, for it imposes no punishment. *Cf. Cummings* v. *State of Missouri*, 4 Wall. 277. A presumption general in its terms, founded on substantial experience, and subject to dissolution in a judicial proceeding, is in no event a bill of attainder. It is well established that even in criminal cases the burden of proving certain facts can be shifted to the defendant without violating his constitutional rights. *Casey* v. *United States*, 276 U.S. 413, 418. *Morrison* v. *California*, 291 U.S. 82, 88. *Cases* v. *United States*, 131 F. 2d 916 (1st Cir. 1942); cert. den. *sub nom. Velazquez* v. *United States*, 319 U.S. 770; reh. den., 324 U.S. 889.

Hawker v. *New York*, 170 U.S. 189 (1898), supports the authority of Congress to impose present sanctions on the basis of a past judicial finding of illegal conduct. There a New York statute made a criminal conviction, even prior to passage of the law, conclusive evidence of unfitness to serve as a doctor; here the suspension of literacy

[1] U.S. Const. art. I, § 9.

tests in section 4 may be affirmed on the basis of a judicial finding of illegal voting dicrimination made prior to as well as after enactment of the Act.

Arguments that the Act operates "retroactively" or is based on a "legislative trial" are frivolous: all regulatory legislation must be based on legislative findings as to antecedent facts. Such legislation has been consistently upheld where reasonable and where there is "some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another . . . [is not] so unreasonable as to be a purely arbitrary mandate." *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, 219 U.S. 35, 43. *Cf. Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 571. *Reynolds* v. *United States*, 292 U.S. 443, 449. *Porter* v. *Senderowitz*, 158 F. 2d 435, 440 (3d Cir. 1946); cert. den. *sub nom. Senderowitz* v. *Fleming*, 330 U.S. 848. *Dunn* v. *Grisham*, 157 So. 2d 766, 769-770 (1963) (S. Ct. Miss.). Black, Constitutional Prohibitions, § 179 (1887 ed.). See also *Guaranty Trust Co.* v. *Henwood*, 307 U.S. 247; *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240.

Admittedly the Act establishes a presumption which, like all legislative presumptions, has a quality of arbitrariness. The Legislature has to draw lines at some point, and one can always argue in a given instance that the line should have been drawn at some slightly different point. However, so long as the legislation is reasonable and rational, it is for the Legislature, not the Court, to draw the lines.

Given the facts and circumstances of the situation and the widespread refusal of certain states to abide by the Fourteenth and Fifteenth Amendments, Congress has acted reasonably and discreetly, and in a manner consistent with a due regard for the rights of all the states.

Conclusion.

The right of all United States citizens to vote on equal terms, without reference to their race or color, is such an ingrained, accepted part of the system of values under which modern Americans live that it is incomprehensible, in the year 1965, to realize that in a few states this right is still not acknowledged. The Voting Rights Act of 1965 is a reasonable effort by Congress, after years of frustration and failure, to carry out the clear mandate of the Fifteenth Amendment. We respectfully urge the Court to uphold the constitutionality of said Act.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 22, Original

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

BRIEF FOR THE DEFENDANT

JURISDICTION

This is an action between a State and a citizen of another State.[1] The original jurisdiction of this Court is invoked under Article III, Section 2, Clauses 1 and 2 of the Constitution and 28 U.S.C. 1251(b)(3).

QUESTION PRESENTED

Whether the Voting Rights Act of 1965 is a constitutional exercise of congressional power under the Fifteenth Amendment.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal constitutional provisions involved are Article I, Section 2, Clause 1, and Section 4, Clause 1, and the Fifteenth and Seventeenth Amendments,

[1] Attorney General Katzenbach is a citizen of New Jersey.

[2] See note 4, *infra*, p. 3.

which are set forth in the Appendix at p. 88. The federal statute involved is the Voting Rights Act of 1965 which is set forth in the Appendix at pp. 89–106. The South Carolina laws involved are Article II, Sections 3–6, of the South Carolina Constitution and 23 S.C. Code 62, which are set forth in the Appendix at pp. 106–109.

STATEMENT

A. PLEADINGS AND PROCEDURE

South Carolina commenced this original action against the Attorney General of the United States by filing the necessary motion (together with its proposed complaint and a supporting brief) on September 29, 1965. In a responsive memorandum we stated our belief that under Article III, Section 2, Clauses 1 and 2, of the Constitution, the Court had jurisdiction to entertain the action and might appropriately exercise that jurisdiction in this case.[3] By order dated No-

[3] In the memorandum for the defendant submitted in October 1965, it was suggested (at p. 2) that the constitutional issue might be prematurely presented by this action because, under Section 4(a) of the Act, South Carolina has an alternative remedy by seeking exemption from the substantive requirements of the Act in the United States District Court for the District of Columbia. In view of the Court's decision to grant plaintiff's motion for leave to file the complaint herein, we proceed to the merits in this brief. We recognize in this connection that plaintiff's challenge embraces the automatic character of the suspension of portions of its voting regulations effected by the Act, and the procedure and criteria provided for terminating that suspension by an action in the District of Columbia. Moreover, it may be that the suspended tests and devices have in fact been used in South Carolina for the purpose of denying the right to vote on account of race during the past five years, in which case the statutory remedy, for the time being, would be ineffective with respect to South Carolina.

vember 5, 1965, the Court granted plaintiff's motion for leave to file the complaint and directed the answer filed and the merits briefed on an expedited schedule. 382 U.S. 898. The defendant answered the complaint on November 19, 1965.

In its complaint South Carolina challenges the constitutionality of the Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437, and seeks a decree enjoining the enforcement of the principal provisions of the Act with respect to plaintiff, its political subdivisions, officials and inhabitants (Complaint, p. 16).[4] The Attorney General's answer admits the material factual allegations of the complaint but denies the legal conclusion that the statute overreaches the constitutional power of Congress.

B. THE STRUCTURE AND APPLICATION OF THE ACT

The Act's declared purpose is, primarily, "[t]o enforce the fifteenth amendment to the Constitution

[4] Several of the Act's operative provisions—inapplicable to South Carolina, for the present at least—have not been challenged by the complaint. Those are: Section 3 (authorizing, as part of the equitable relief which may be afforded in actions instituted by the Attorney General to enforce the guarantees of the Fifteenth Amendment, the appointment of examiners, the suspension of State literacy tests and similar prerequisites to voting, and judicial review of certain State voting procedures); Section 4(e) (securing voting rights of persons educated in American-flag schools in which the predominant classroom language was other than English); and Section 10 (authorizing the Attorney General to institute actions to enjoin the enforcement of poll taxes as a precondition to voting). In addition, we believe that it would be premature for the Court to consider the constitutionality of the criminal sanctions provided in Sections 11 and 12 (a), (b) and (c), none of which has been invoked.

of the United States * * *." Its principal thrust is aimed at literacy tests and similar "tests and devices" used to deny, on account of race or color, the right of citizens to vote in federal, State and local elections. The phrase "test or device" is defined to mean—

> * * * any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class [Section 4 (c)].

The Act has four key features: (1) a triggering mechanism which determines the applicability of the substantive provisions; (2) a temporary suspension of tests or devices (as defined); (3) a program for the use of federal examiners to qualify applicants for voter registration; and (4) a procedure for the review of substantive qualifications and practices and procedures relating to voting adopted after November 1, 1964.

1. THE TRIGGERING MECHANISM

The substantive provisions of the Act take effect, in the first instance, only following two factual determinations. Section 4(b) provides for initial applicability—

> * * * in any State or in any political subdivision of a State [separately considered] which (1) the Attorney General determines maintained on November 1, 1964, any test or

> device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

These determinations become effective upon publication in the Federal Register and are not reviewable in any court. Both determinations were made with respect to South Carolina on August 6, 1965 (30 Fed. Reg. 9897).[5]

Upon publication of these determinations, the Act becomes fully operative in the territory of the affected State or subdivision, unless, pursuant to Section 4(a),

> * * * the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no * * * test or device [as previously de-

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[5] On the same day, the same determinations were made with respect to six other States (Alabama, Alaska, Georgia, Louisiana, Mississippi and Virginia), 26 counties in North Carolina and one county in Arizona. 30 Fed. Reg. 9897. The Director of the Census incorporated in the notice of his determination the statement that "Current studies of other political subdivisions will be completed as soon as the relevant data are obtained * * *" (*ibid.*). On November 18, 1965, the Director of the Census announced his determination that less than 50 percent of the persons of voting age residing in each of two counties in Arizona, one county in Hawaii, and one county in Idaho had voted in the presidential election of November 1964. 30 Fed. Reg. 14505. It had previously been determined by the Attorney General that tests or devices were maintained on November 1, 1964, by the three States embracing those four counties. 30 Fed. Reg. 9897.

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> fined] has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *.

Such actions for exemption are to be heard by a three-judge court under 28 U.S.C. 2284, with appeal lying directly to this Court. Section 4(a) directs the Attorney General to "consent to the entry of such [declaratory] judgment" if he determines that he has "no reason to believe" that any such test or device has been so used during the preceding five years, and Section 4(d) provides that

> * * * no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

On the other hand, a proviso to Section 4(a) prohibits the entry of a declaratory judgment terminating applicability

> * * * with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of

such tests or devices have occurred anywhere in the territory of such plaintiff.

At the present time neither South Carolina nor any other affected State or subdivision has initiated proceedings for declaratory relief under Section 4(a). No judgments are outstanding which would, under the proviso to Section 4(a), preclude South Carolina from seeking such relief at this time.[6]

2. SUSPENSION OF TESTS AND DEVICES

As an immediate and automatic consequence of the publication of the two administrative determinations previously discussed, enforcement of tests or devices is suspended in the affected State or subdivision. Section 4(a) provides:

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit * * *.

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[6] Such temporarily preclusive judgments have been entered with respect to Alabama (see, *e.g.*, *United States* v. *Logue*, C.A. 3081–63, S.D. Ala. (June 9, 1965)); Georgia (see, *e.g.*, *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga.) (September 13, 1960)); Louisiana (see, *e.g.*, *United States* v. *Clement*, 231 F. Supp. 913 (W.D. La.) (July 14, 1964)); and Mississippi (see, *e.g.*, *United States* v. *Cox*, D–C–53–61, N.D. Miss. (June 24, 1964 and August 13, 1965)).

The suspension continues in effect until the terminating declaratory judgment described above is obtained. Accordingly, South Carolina is not at present free to enforce its requirement that to qualify for registration a person must, *inter alia*, be able to—

> * * * read and write any section of said [State] Constitution submitted to said elector by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more * * * [23 S.C. Code 62(4) (Supp. 1964)].[7]

All other voting qualifications maintained by South Carolina on November 1, 1964, are unaffected. Thus, so far as the Voting Rights Act is concerned, South Carolina remains free to refuse the franchise to those who do not satisfy existing citizenship, age and residence requirements, or who have been declared mental incompetents, have been convicted of specified crimes, are confined in prison, or are paupers supported at public expense. 23 S.C. Code 62 (1964 Supp.); S.C. Const., Art. 2, Secs. 3, 4, 6 (1964 Supp.).

3. REVIEW OF NEW VOTING STANDARDS AND PROCEDURES

During the period of time that the suspension of tests and devices is in effect in a State or subdivision, Section 5 precludes the State or subdivision from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure

[7] The Attorney General has interpreted the property test contained in 23 S.C. Code 62(4) to be inseparable from the literacy test (30 Fed. Reg. 14045–14046). Compare *Guinn* v. *United States*, 238 U.S. 347.

with respect to voting different from that in force or effect on November 1, 1964," without first obtaining either the acquiescence of the Attorney General or a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

4. FEDERAL EXAMINERS

The Attorney General is authorized by Section 6 to request the Civil Service Commission to appoint examiners to serve in any political subdivision in which tests and devices are suspended when—

> * * * (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) * * * in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment * * *.

The function of the examiners is to examine applicants for voting and place on a list of eligible voters

the names of those found to have the qualifications prescribed by State law which are not suspended by the Voting Rights Act or inconsistent with the Constitution and laws of the United States. These lists are to be transmitted to appropriate State officials who are required to transfer the listed names to the official voting roll (Section 7). Pursuant to Section 6, the Attorney General certified on October 29, 1965, that the appointment of examiners was necessary to enforce the guarantees of the Fifteenth Amendment in Clarendon County and Dorchester County, South Carolina. 30 Fed. Reg. 13850. Examiners appointed by the Civil Service Commission have been serving in those two counties since November 8, 1965.[8]

Persons whose names have been listed and transmitted by an examiner are entitled to vote in the election district of their residence unless (1) the election occurs less than 45 days after the transmittal (Section 7(b)) or (2) they are subsequently determined to be ineligible under valid State law (Section 7(d)). Each examiner's list of eligible voters must be made available for public inspection. Under Section 9 any listing may be challenged before a hearing officer appointed by the Civil Service Commission, and the decision of the hearing officer may be reviewed for

[8] The regulations established for examiners in South Carolina by the Civil Service Commission appear at 30 Fed. Reg. 9859–9861, 14045–14046. As of this writing, certifications of necessity have also been issued by the Attorney General with respect to 10 counties in Alabama, 30 Fed. Reg. 9970, 9971, 10863, 12654, 13849; five counties in Louisiana, 30 Fed. Reg. 9971, 10863, 13849 and 19 counties in Mississippi, 30 Fed Reg. 9971, 10863, 12363, 13849, 13850, 15837.

clear error in the United States court of appeals for the circuit in which the person challenged resides.[9]

In any political subdivision in which an examiner is serving under Section 6 of the Act, the Civil Service Commission is also authorized to assign, at the request of the Attorney General, "observers" whose function it is

> * * * (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. * * * [Section 8].

Moreover, if, within forty-eight hours after an election, a claim is made by persons eligible to vote who are registered or listed that they have not been permitted to vote, the examiner is to notify the Attorney General if he believes the allegations to be well founded (Section 12(e)). Upon receiving such notification, the Attorney General is authorized to apply in the district court for an order providing for the marking, casting, and counting of the ballots of such persons and the inclusion of their votes in the total vote before the results of such election shall be deemed final (Section 12(e)). The procedures set forth in Sections 8 and 12(e) have not as yet been employed.

[9] For a review of the operation of the challenge procedure under Section 9, see United States Commission on Civil Rights, *The Voting Rights Act: The First Months* (Nov. 1965), pp. 19-20.

The use of examiners in any political subdivision ceases whenever the suspension of tests and devices is terminated by declaratory judgment under Section 4(a) or whenever the Attorney General requests such termination. The use of examiners may also be terminated, pursuant to Section 13,

> * * * whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision * * *.

A subdivision seeking such a declaratory judgment may petition the Attorney General to request the Director of the Census to determine whether 50 per cent of the nonwhite persons of voting age are registered to vote in the subdivision. If the district court finds that the Attorney General has arbitrarily or unreasonably refused to request the Director of the Census to make the necessary determination, the court is authorized to require the Director to make it (Section 13). In none of the subdivisions to which examiners have been assigned has such assignment been terminated at this time.

C. THE SOUTH CAROLINA ELECTION LAW

The South Carolina law directly affected by the Voting Rights Act of 1965 is that portion of Section 62 of Title 23 of the Code which requires every applicant for voting registration to show that he—

> Can both read and write any section of [the State] Constitution submitted to said elector by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more * * *.
>
> * * * * *

This provision is drawn directly from Article 2, §4, of the South Carolina Constitution which, in pertinent part, provides:

> (d) *Qualification for registration after January, 1898.*—Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: *Provided*, That he can both read and write any Section of this Constitution submitted to him by the registration officer, or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars ($300) or more.

That has been the law of South Carolina since the adoption of the State Constitution in 1895.[11]

[11] The principal amendments to the suffrage provisions of the Constitution of 1895 have been as follows:

1. An amendment ratified in 1931 eliminating, as a requirement for voting, proof of payment of taxes other than the poll tax. S.C. Stat. 1929, p. 693.

2. An amendment ratified in 1945 in response to the decision

The Constitution of 1895, however, represented a sharp break with the past—in its terms if not in its consequences. From 1810 until the end of the Civil War, South Carolina had enjoyed white manhood suffrage without significant property qualifications and no literacy qualifications.[11] The Constitution pre-

in *Smith* v. *Allwright*, 321 U.S. 649, eliminating the section requiring the General Assembly to regulate party primary elections. S.C. Stat. 1945, p. 10. In *Elmore* v. *Rice*, 72 F. Supp. 516 (E.D. S.C.), affirmed *sub nom. Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875, it was found that the amendment was adopted "with the avowed purpose of preventing voting by Negroes in the Democratic primaries of the state" 165 F. 2d at 388. In recommending the amendment to the State legislature, Governor (later Senator) Olin Johnston stated:

> After these statutes are repealed, in my opinion, we will have done everything within out power to guarantee white supremacy in our primaries of our State insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries * * *.
>
> White Supremacy will be maintained in our primaries. Let the chips fall where they may. [Quoted in *Elmore* v. *Rice*, 72 F. Supp. at 520.]

Following repeal of all statutory and constitutional provisions for the regulation of primaries, the State Democratic Party reaffirmed its regulation limiting participation in primaries to white Democrats. When that limitation was invalidated by the *Elmore* decision, the party for the first time adopted a literacy qualification. See Key, *Southern Politics in State and Nation* (1949) 627–629.

3. An amendment ratified in 1949 eliminating the requirement for payment of the poll tax. S.C. Stat. 1949, p. 773.

4. An amendment ratified in 1962 lowering the State, county, and polling precinct residence requirements. S.C. Stat. 1962, p. 2314.

[11] See Thorpe, *American Charters, Constitutions, and Organic Laws* (1909) 3267. As an alternative to the property or tax-paying qualifications which had been specified by the constitu-

pared by the first post-Civil War convention, which was called on September 13, 1865, preserved the prior practice and "shunned all suggestions that suffrage be given the Negro in any form." [12]

A second post-war convention was called in 1868 to comply with congressional legislation.[13] Article VIII of the Constitution of 1868 established virtually universal manhood suffrage. Thorpe, *op. cit. supra,* 3297–3298. A proposal to impose a literacy test, to become effective in 1875, was voted down 107–2. *Proceedings of the Convention of 1868* at 826, 827–834. The vote was given to every male citizen of the United States at least twenty-one years of age, "without distinctions of race, color, or former condition," who had resided in the State "at the time of the adoption of this constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote, sixty days next preceding any elec-

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tion of 1790 (*id.* at 3258–3259), the Constitution of 1810 allowed a free white man to vote if he had resided in the State for two years and in the election district for six months. Paupers and non-commissioned officers and soldiers in the United States Army were excluded.

[12] Simkins and Woody, *South Carolina During Reconstruction* (1932) 41. See Thorpe, *op. cit. supra* at 3276.

[13] See 14 Stat. 428–429 and 15 Stat. 2–4, 14–16, where Congress prescribed, as a condition for representation in that body, that a constitutional convention must be held in each of the unreconstructed States, consisting of delegates "elected by the male citizens . . . of whatever race, color, or previous condition", exclusive of those disfranchised by the Fourteenth Amendment, and that the Constitution framed by those bodies must grant suffrage to "the male citizens . . . of whatever race, color, or previous condition," and be ratified by the same electorate approved by Congress. Ratification of the Fourteenth Amendment was also required.

tion * * *." Persons disqualified by the Fourteenth Amendment from office-holding were to remain disfranchised until such disqualification should be removed by Congress. Persons kept in an almhouse or asylum, those of unsound mind, and those confined in public prison were also disqualified. The State legislature was forbidden to disfranchise anyone except those convicted of treason, murder, robbery, or dueling. Disfranchisement was not allowed for felony or other crime which had been committed by a person while he was a slave. It was also made "the duty of the general assembly to provide from time to time for the registration of all electors."

Within a decade, however, the guarantees of the Constitution of 1868 were being whittled away in practice. Among the devices used to limit the voice of the Negro in governing the affairs of the State were the expulsion from the legislature of seventeen Republican representatives from Charleston; the abolition, in 1878, of voting precincts in areas with large Republican majorities (16 S.C. Stat. 565–570); adoption of a gerrymandering scheme that concentrated 25,000 Negroes in one congressional district (17 S.C. Stat. 1169–1171); and mob violence.[14] The so-called "eight-box" system was adopted in 1882 (17 S.C. Stat. 1110–1126). It provided for separate ballot boxes for each of eight different classes of offices and required each voter, unassisted, to place a separate

[14] See, generally, Simkins and Woody, *op. cit. supra* at 499–504, 547–549; Simkins, *Pitchfork Ben Tillman* (1964) 75; W. W. Ball, *The State that Forgot: South Carolina's Surrender to Democracy* (1932) 169–170.

ballot in the correct box or have his ballot invalidated. A registration law, also adopted in 1882 (*ibid.*), empowered registration officials, appointed by the governor, to determine the legal qualifications of all applicants. It also excluded from future registration persons who were qualified to register in 1882 but who failed to do so. An 1888 statute (20 S.C. Stat. 10–12) required that primaries be conducted in accordance, *inter alia,* with the rules of the Democratic Party. In 1890 the South Carolina Democratic Party adopted a constitution which permitted only white Democrats to vote in party primaries, "except that Negroes who voted for General Hampton in 1876 and who have voted the Democratic ticket continuously since may be allowed to vote." Carlisle, *Party Loyalty* (1963) 13. The progress of affairs and the program for the future were summarized by Senator (formerly Governor) Benjamin Tillman in an address to the constitutional convention of 1895 (Journal of the South Carolina Constitutional Convention of 1895, p. 463 *et seq.*):

> How did we recover our liberty [in 1876]? By fraud and violence. We tried to overcome the thirty thousand [Negro] majority by honest methods, which was a mathematical impossibility. * * * By fraud and violence, if you please, we threw it off. In 1878 we had to resort to more fraud and violence, and so again in 1880. Then the Registration Law and eight-box system was evolved from the superior intelligence of the white man to check and control this surging, muddy stream of ignorance and to tell it to back, and since then we have

> carried our elections without resort to any illegal methods, simply because the whites were united. If we were to remain united it would still be desirable that we should guard against the possibility of this flood, which is now dammed up, breaking loose; or, like the viper that is asleep, only to be warmed into life again and sting us whenever some more white rascals, native or foreign, come here and mobilize the ignorant blacks. Therefore, the only thing we can do as patriots and as statesmen is to take from them every ballot that we can under the laws of our national government.

That further restriction of the right to vote was the principal objective of the convention of 1895 is clear. A leading South Carolina historian states:

> The elimination of the negro from politics as effectively as this could be accomplished by constitutional enactment was the one object that had sustained the agitation for a new constitution. The negro thus enjoys the distinction of having been the cause for the formation of the State's last two constitutions, the one having been brought into being for the especial purpose of giving him the largest political rights, the other for the especial purpose of taking these away. [D.D. Wallace, *The South Carolina Constitution of 1895* (1927) 30.]

Delegates to the convention were elected under a registration law adopted in 1894 (21 S.C. Stat. 804-805) which subjected those who had registered prior to 1882 and new applicants for registration to elabo-

rate requirements including affidavits and vouchers." In addition, Governor Tillman

> * * * instructed election officials to refuse to issue registration blanks to Negro applicants. The attorney general explained that this was done because the election law did not provide for the printing of the blanks, but the Republican state chairman clearly demonstrated "a general conspiracy" to withhold the desired papers."

The convention when assembled was composed of 6 Negroes and 156 whites, although Negroes constituted a majority of South Carolina's population." The Temporary Chairman set the tone of the convention in his initial address: "

> That Constitution [of 1868] was made by aliens, negroes and natives without character, all the enemies of South Carolina, and was

" When the registration laws were temporarily held to be violative of the Fourteenth and Fifteenth Amendments (*Mills v. Green*, 67 Fed. 818 (D.S.C.), *reversed*, 69 Fed. 852 (C.A. 4)), the governor, Benjamin Tillman, commented that "[I] do not know what the United States Supreme Court will do, but I do know this, the Constitutional Convention will be held. It will be composed of white men principally, who will take care of South Carolina, and see that white supremacy is maintained within her borders." (Charleston *News and Courier*, May 11, 1895, p. 2, col. 1.) Tillman later added: "The devil forgot that while the registration law may go and the eight-box law may amount to nothing, that the shotgun has gone nowhere, but we don't want to use it." (Charleston *News and Courier*, July 28, 1895, p. 1, col. 1.)

" Simkins, *Pitchfork Ben Tillman* (1964) 290.

" See Bureau of the Census, *Negro Population 1790–1915* (1918) 44–45, 840.

" *Journal of the South Carolina Constitutional Convention of 1895* at 2.

> designed to degrade our State, insult our people and overturn our civilization. It is a stain upon the reputation of South Carolina that she has voluntarily lived for 18 years under that instrument after she had acquired full control of every department of her government, but it is a lasting honor to the people of the State that when they took control of their own affairs they set to work to do away with this instrument of their humiliation, in their day of defeat, and in its place to have an organic law which shall be the work of their own hands.

Senator Tillman spoke in the same vein:[19]

> The negroes put the little pieces of paper in the box that gave the commission to these white scoundrels [prior to 1876] who were their leaders and the men who debauched them; and this must be our justification, our vindication and our excuse to the world that we are met in Convention openly, boldly, without any pretense of secrecy, to announce that it is our purpose, as far as we may, without coming into conflict with the United States Constitution, to put such safeguards around this ballot in future, to so restrict the suffrage and circumscribe it, that this infamy can never come about again.

Under Tillman's leadership, a Democratic Party conference prior to the convention had agreed upon a system of registration qualifications which would effectively disenfranchise Negroes but not whites.[20] The

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[19] *Journal of the South Carolina Constitutional Convention of 1895* at 463.

[20] The text of the agreement is set forth in the Charleston *News and Courier*, March 2, 1895, p. 4, cols. 2–3.

keystone of that system was Section 4 (c) and (d) of Article 2 of the Constitution as adopted by the convention (Appendix, *infra*, p. 107). Under that system, until 1898 a person could register permanently if, in the judgment of a registration officer, he could "understand and explain" any section of the State constitution submitted to him, regardless of whether he could read or write. After January 1, 1898, no one could register unless he could read and write or owned and had paid taxes on property assessed at $300 or more. Approximately 73% of the Negroes and 18% of the whites in South Carolina were then illiterate.[21] Senator Tillman candidly explained to the convention the practical operation of the new tests;[22]

> * * * I dictated the terms on which we [at the conference] agreed, and the basic principle was that no white man should be disfranchised except for crime, because that was the guiding star which actuated my entire purpose and action.
>
> * * * * *
>
> * * * If you put in here that a man must understand, and you vest the right to judge whether he understands in an officer, it is a constitutional act. That officer is responsible to his conscience and his God, he is responsible to nobody else. There is no particle of fraud or illegality in it. It is just simply showing

[21] See Compendium of the Eleventh Census, Pt. III, p. 316 (1890); S. Rep. 162, 89th Cong., 1st Sess. (1965), Pt. 3, p. 4.

[22] *Journal of the South Carolina Constitutional Convention of 1895* at 467, 469, 471.

> partiality, perhaps, [laughter] or discriminating."
>
> * * * * *
>
> * * * By means of the $300 clause you simply reach out and take in some more white men and a few more colored men.

Reviewing the work of the convention, an historian writes:[23]

> This [the clause permitting registration prior to 1898 of those who could understand and explain a section read to them] was intended primarily to take care of the unlettered among the Confederate veterans. Those upon this list were to be registered for life; all others are required to register every ten years. Altho the "understanding" clause was inserted as an ironclad special protection of the existing white illiterates, it was tacitly assumed that the educational or property tests would not be applied against white men who became of age after the expiration of the "understanding" clause. As a matter of fact they never have been. But against the negro they are rigidly enforced. * * *

The Constitution adopted by the convention was not submitted to popular referendum and became operative by its terms after December 31, 1895. The literacy test which it included has not been altered in the ensuing 70 years. It is the suspension of that test by the Voting Rights Act of 1965 which South Carolina here challenges.

SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 has two main pro-

[23] D. D. Wallace, *op. cit., supra*, at 34.

visions relevant here. One relates to the suspension, under specified circumstances, of tests and devices often used to deny or abridge the right to vote on account of race or color. The test here involved is South Carolina's literacy test. The other principal provision relates to the appointment of federal examiners to conduct the registration of voters. Both rest upon the power granted to Congress by Section 2 of the Fifteenth Amendment to enforce the provisions of Section 1.

The constitutionality of the provisions relating to voting tests and devices is grounded upon four basic propositions:

First, Congress has comprehensive authority under the Fifteenth Amendment to enact laws reasonably adapted to the objective of preventing abridgement of the right to vote on the basis of race or color; State laws adopted pursuant to the reserved power to determine the qualifications of electors must of course yield to such measures.

Second, Congress, acting pursuant to its power "to enforce" the constitutional prohibition against denial of the right to vote on account of race or color, may prohibit the use of any test or device, including a literacy test, under circumstances where it carries substantial danger of racial discrimination, even though the test, used under other circumstances in a nondiscriminatory fashion, might be a qualification for voting that a State could constitutionally impose. The decision in *Louisiana* v. *United States,* 380 U.S. 145, establishes the core of this proposition. We urge no more than the application of the rationale of that decision to legislative as well as judicial power.

Third, Congress had ample basis for concluding that, where less than half the adult population participated in a Presidential election in a State or political subdivision which maintained one of the tests or devices often used to deny the right to vote on account of race, there was so substantial a probability of abuse of the test as to warrant suspending it unless and until freedom from abuse could be proved. There was urgent need for a general and immediate remedy addressed to the widespread use of tests and devices as instruments of racial discrimination. It was essential that the remedy, at least in the initial phase, be substantially self-executing. The juxtaposition of the two facts whose determination triggers the suspension of all tests and devices—the participation of less than fifty percent of the adult population in the last election plus the maintenance of a test or device of a kind often used as an instrument of racial discrimination—itself demonstrates substantial danger that the device has been and will be thus abused. The gravity of the danger becomes even more apparent when it is observed, as Congress noticed, that the critical facts coexist chiefly in areas which have long enforced segregation as a State policy and resorted to sundry devices to maintain white supremacy at the polls. While these conditions demonstrate a danger of violation of the Fifteenth Amendment that would surely have warranted outright proscription of any test or device, Congress chose to minimize any risk of outlawing tests where there was no significant danger of abuse by allowing a State (or political subdivision) to terminate the

suspension by proof that it had not engaged in denying Negroes equal voting rights in violation of the Fifteenth Amendment.

Fourth, the procedure established by Section 4(a) affords any State or political subdivision affected by the triggering device a fair and reasonable opportunity of demonstrating that the apparently substantial danger that its test or device is used for the purpose of violating the Fifteenth Amendment has not in fact been realized. Shifting the burden of proof to the State or political subdivision is justified not only by the strength of the inference to be drawn from the facts determined by the Attorney General and the Director of the Census but also by the fact that the State officials are the ones who know how they have administered the test and presumably have the records demonstrating its use. It must be remembered, moreover, that Congress can deal with substantial dangers of violation as well as actual infractions. Finally, trial of the issue in the federal courts at the Nation's capitol ensures a convenient location and fair determination.

The provision for the appointment of federal examiners to determine the qualifications of voters is equally a proper exercise of the power conferred by Section 2 of the Fifteenth Amendment. So, also, is the provision requiring screening of new voting standards and procedures. In both instances Congress was appropriately dealing with attempts at circumvention which, experience shows, are to be feared in at least some of the areas where discrimination against the Negro franchise has persisted for almost a century.

ARGUMENT

I

CONGRESS HAS COMPREHENSIVE AUTHORITY TO PROTECT AND ENFORCE THE CITIZEN'S RIGHT TO VOTE FREE OF RACIAL DISCRIMINATION AND TO ADOPT THE MEASURES APPROPRIATE TO THAT END

In enacting the Voting Rights Act of 1965, Congress was unmistakably invoking its powers under the Fifteenth Amendment. Whether it exceeded those powers and invaded rights reserved to the States, as South Carolina contends, must be determined from an analysis of the scope of the grant and the nature of the reservation.

A. SECTION 2 OF THE FIFTEENTH AMENDMENT CONFERS UPON CONGRESS POWER TO ENACT ALL LEGISLATION REASONABLY ADAPTED TO THE OBJECTIVE OF PREVENTING ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

The command of the Fifteenth Amendment is clear and the grant of power explicit:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The Act accordingly is founded upon powers expressly delegated by the people and by the States to the national legislature. Congress did not here rely upon some inherent but unexpressed power. No process of inference or deduction is needed to discover the source of its authority. As the Court wrote in 1875, "the

amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'" *United States* v. *Reese*, 92 U.S. 214, 218. It follows that Chief Justice Marshall's statement in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, with respect to another express power—the power to regulate interstate commerce—is equally applicable here:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than one prescribed in the constitution." * * *

What is more, the power invoked is directly related to the object of the legislation. In no sense is the Fifteenth Amendment here used as a pretext to further different ends. The provisions of the Voting Rights Act now in suit are plainly designed to secure compliance with the command of the Fifteenth Amendment. Congressional action was prompted by the President's appeal for an act "eliminat[ing] illegal barriers to the right to vote." 111 Cong. Rec. 4924 (March 15, 1965). Nothing in the Congressional hearings, reports or debates remotely suggests any

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"That doctrine was reiterated only last Term in *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 255, where the Court unanimously sustained Title II of the Civil Rights Act of 1964.

purpose other than the enforcement of the Fifteenth Amendment. The central provision of the Act asserts that it is intended "[t]o assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color" (Section 4(a)). The operation of the principal provisions is terminated as soon as it is judicially determined that no test or device has been used during the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" (Section 4(a)). Congress was unmistakably striking at the evil condemned by the Fifteenth Amendment.

Nor can there be any doubt that Congress was fulfilling its constitutional role in the Voting Rights Act. It is the national legislature—rather than the Executive or the Judiciary—that has principal responsibility for fashioning the means of protecting the right created by the Fifteenth Amendment. Not only did the draftsmen of the amendment expressly provide for Congressional action: it is clear that they placed greatest reliance on the legislative branch to enforce the right to vote without racial discrimination wherever that right was not freely recognized. See Mathews, *Legislative and Judicial History of the Fifteenth Amendment* (1909), pp. 76–79. As stated in *Ex Parte Virginia,* 100 U.S. 339, 345:

> All of the [Civil War] amendments derive much of their force from [the provisions empowering Congress to enact "appropriate legislation"]. It is not said the *judicial power* of the general government shall extend to enfore-

> ing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. * * *

Both the appropriateness of legislative action, and the limited capacity of the judiciary to cope with massive efforts to evade the command of the Fifteenth Amendment, have long been evident. Writing for the Court in *Giles* v. *Harris,* 189 U.S. 475, 488, Mr. Justice Holmes stated:

> The bill [in equity] imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

Indeed, from the beginning it has been clear that the right granted by the Fifteenth Amendment "should

be kept free and pure by congressional enactments whenever that is necessary." *Ex Parte Yarbrough*, 110 U.S. 651, 665. See, also, *Terry* v. *Adams*, 345 U.S. 461, 467–468.

The choice of means is largely a question for Congress itself. Chief Justice Marshall stated the breadth of legislative discretion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are consitutional." The same rule applies here. Speaking of the Civil War amendments the Court stated in *Ex Parte Virginia*, 100 U.S. at 345–346:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

In short, "Congress is not limited to such measures as are indispensably necessary to give effect to its express powers." *Everard's Breweries* v. *Day*, 265 U.S. 545, 558–559. On the contrary, it has broad and exclusive discretion in fashioning the legislative remedy—a discretion subject to "only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262.

In the exercise of its power to protect the right to vote without racial discrimination Congress, in times past, has enacted quite sweeping statutes. See the very comprehensive Act of May 31, 1870, 16 Stat. 140, amended by the Act of February 28, 1871, 16 Stat. 433, repealed in part by the Act of February 8, 1894, 28 Stat. 36; and the voting rights provisions of the Civil Rights Acts of 1957 (71 Stat. 634), of 1960 (74 Stat. 86, 90), and of 1964 (78 Stat. 241), now codified in 42 U.S.C. 1971–1975. While *United States* v. *Reese,* 92 U.S. 214, and *James* v. *Bowman,* 190 U.S. 127, invalidated certain criminal sanctions in the early statutes on the ground that they were not restricted to racial discrimination (in *Reese*) or to State action (in *Bowman*), the power of Congress to deal fully with all aspects of racial discrimination in voting has never been doubted.[29] See *Reese,* 92 U.S. at 218; *Bowman,* 190 U.S. at 138–139. In the area of Congressional elections, the Court early sustained detailed systems of federal supervision of State registration and voting procedures in many ways similar to the provisions for examiners and observers in the present Act. See *Ex Parte Siebold,* 100 U.S. 371; *United States* v. *Gale,* 109 U.S. 65. See, also, *Smiley* v. *Holm,* 285 U.S. 355, 366–367; *United States* v. *Classic,* 313 U.S. 299, 315; *United States* v. *Scarborough,* 348 F. 2d 168 (C.A. 5).

[29] The unnecessary and premature character of the constitutional ruling in *Reese* was recognized by the Court in *United States* v. *Raines,* 362 U.S. 17, 24, which upheld against constitutional attack the validity of portions of the Civil Rights Act of 1957.

Constitutional assaults on the more recent voting rights legislation have been uniformly rejected. In *United States* v. *Raines,* 362 U.S. 17, the Court upheld the authority of the Attorney General under the Civil Rights Act of 1957, 42 U.S.C. 1971(c), to maintain an action for injunctive relief against State registrars alleged to have "delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualification to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants." 172 F. Supp. 552, 555 (M.D. Ga.). See, also, *United States* v. *Thomas,* 362 U.S. 58, affirming *per curiam,* 180 F. Supp. 10 (E.D. La.).

In *Hannah* v. *Larche,* 363 U.S. 420, the Court sustained the procedure of the United States Commission of Civil Rights in conducting hearings concerning racial discrimination in voting in Louisiana (42 U.S.C. 1975(c)) and broadly held the Act to be appropriate legislation under the Fifteenth Amendment.

In *Alabama* v. *United States,* 371 U.S. 37, the Court affirmed, *per curiam,* an injunction issued under the Civil Rights Act of 1960, which affirmatively ordered that registration certificates be issued to 64 specified Negro applicants; that registration applications be received on at least two days a month; that not fewer than six applications be processed simultaneously; that writing tests used not exceed fifty consecutive words from the Constitution; that rejected applicants be informed of the precise reasons therefor;

and that detailed monthly reports be submitted to the court and the United States Attorney (192 F. Supp. 677 (M.D. Ala.)). And in *Louisiana* v. *United States,* 380 U.S. 145, involving the same statute, the Court affirmed a decision (225 F. Supp. 353 (E.D. La.)) which enjoined enforcement of the Louisiana "interpretation" test, forbade registrars in twenty-one parishes from employing a new "citizenship" test until a complete re-registration was undertaken, and required detailed monthly reports from the registrars in the twenty-one parishes. See, also, *United States* v. *Mississippi,* 380 U.S. 128.

The conclusion is inescapable that, where necessary to protect the right to vote without racial discrimination, Congress has authorized and the courts have sustained "a most detailed supervision of the day-to-day operation of voter registration." *Alabama* v. *United States,* 304 F. 2d 583, 585 (C.A. 5). The present Act goes no further and, as we demonstrate in Point II of this brief, it is "reasonably adapted to the end permitted by the Constitution."

B. STATE LAWS ENACTED PURSUANT TO THE RESERVED POWER TO DETERMINE THE QUALIFICATIONS OF ELECTORS ARE SUBJECT TO THE SUPREMACY OF LAWS OF THE UNITED STATES ENACTED PURSUANT TO THE POWERS GRANTED TO CONGRESS TO ENFORCE THE FIFTEENTH AMENDMENT

There is no merit to the argument that the power of Congress to enforce the Fifteenth Amendment cannot be exercised so as to impinge upon the reserved powers of the States to fix voting qualifications and conduct their own elections. To thus constrict an enforcement power granted in one of the Civil War

amendments would be wholly inconsistent with the spirit of the times and the specific purpose to provide for Congressional protection of the rights of the new Negro citizens. It would be at war with our entire constitutional history. Congressional legislation pursuant to a granted power often blocks the exercise of powers otherwise reserved to the States, as illustrated by innumerable cases of federal preemption. This is the simple consequence of the Supremacy Clause of the Constitution.

So saying, we are not unmindful that "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50. See, also, *Minor* v. *Happersett*, 21 Wall. 162; *Pope* v. *Williams*, 193 U.S. 621. But those powers are not without limits. There is no absolute right in the States to determine voting eligibility.

The only provision of the Constitution that expressly grants the States powers with respect to elections is Article I, Section 4, authorizing the State legislatures to prescribe "[t]he Times, Places and Manner of holding Elections for [national] Senators and Representatives," and it, in the next breath, empowers the Congress to "make or alter such Regulations."[26] To

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[26] Article 1, Section 4, Clause 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

be sure, Article I, Section 2,[27] and the Seventeenth Amendment,[28] which specify that those who elect the members of the national legislature "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," have always been read as implying a right in the respective States to fix voter qualifications. But this is far from an explicit grant of exclusive power over elections. Moreover, even here, there is an implied condition: that the qualifications for voting shall not be so high as to defeat the requirement of elections "by the People"—which Madison boasted meant "the great body of the people," "rich" and "poor," "learned" and "ignorant." See *The Federalist,* No. 57, p. 385 (Cooke ed. 1961), quoted in *Wesberry* v. *Sanders,* 376 U.S. 1, 18.

The fact is that State power with respect to elections is circumscribed. We have already noticed the overriding force of Congressional regulation of federal elections. *United States* v. *Classic,* 313 U.S. 299, 315. See, also, *Ex Parte Yarbrough,* 110 U.S. 651; *United States* v. *Mosley,* 238 U.S. 383; *Ex Parte Sie-*

[27] Article 1, Section 2, Clause 1, provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[28] The Seventeenth Amendment provides in relevant part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

bold, 100 U.S. 371. A further restraint is the Twenty-fourth Amendment. See *Harman* v. *Forssenius,* 380 U.S. 528. But State elections, also, are subject to restrictions imposed by the Constitution. The Nineteenth Amendment forbids disqualification on account of sex. The Fourteenth Amendment inhibits the imposition of requirements for registration which are unrelated to a legitimate State interest. *Carrington* v. *Rash,* 380 U.S. 89; *United States* v. *Louisiana, supra,* 225 F. Supp. at 386; see, also, *Reynolds* v. *Sims,* 377 U.S. 533; *Gray* v. *Sanders,* 372 U.S. 368.[29] And, of course, the Fifteenth Amendment bars voting standards that discriminate on account of race or color.

The inference to be drawn from the constitutional provisions relating to the franchise and from their history is that there is an overriding national interest in the right to vote—an interest so great as to warrant the conclusion that the enforcement powers of Congress are not confined by any implied reserved powers of the States but extend, like all other Congressional power, to the enactment of legislation reasonably adapted to the permissible end of preventing violations by proscribing, at least temporarily, State activities which carry that danger. This is particularly clear in the case of the Fifteenth Amendment. Its provisions cannot be read as merely prohibitory—as doing no more than condemning State laws which are plainly unconstitutional. As stressed above, Section 2 of the Amendment conferred the power to

[29] And see the government's brief in *Harper* v. *Virginia State Board of Elections,* No. 48, this Term.

"enforce" the guarantee declared in Section 1—a grant which surely embraces the authority to prescribe detailed regulations designed to guard against the inroads of discrimination in any form.

The true rule was stated more than three-quarters of a century ago (*Ex Parte Yarbrough*, 110 U.S. at 664):

> the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. * * *

Indeed, far from enjoying an unfettered right to erect barriers to the franchise, it may properly be said that every State which substantially curtails the right to vote bears a heavy burden of justifying the qualifications it has established—at least when it is charged that they operate discriminatorily against one race. The reason is a fundamental one: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 555; and see *Wesberry* v. *Sanders*, 376 U.S. 1, 17; *United States* v. *Classic*, 313 U.S. 299. Moreover, "restrictions upon the right to vote," like "restraints upon the dissemination of information," "interferences with political organizations," and "prohibition of peaceable assembly," constitute a type of State action "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4. And, here, as with First Amendment rights, the burden

of piecemeal litigation testing the boundaries of permissible restraint, when cast upon the citizen, may by "unduly onerous" and thus have a "chilling effect" on the exercise of the protected right. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479, 487, 491; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Freedman* v. *Maryland,* 380 U.S. 51, 57–59; *Speiser* v. *Randall,* 357 U.S. 513, 526; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98. Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reyolds* v. *Sims,* 377 U.S. 533, 562. For the same reasons, Congress may put the States to the test of demonstrating that inhibitory voting practices do not offend the command of the Fifteenth Amendment.

II

THE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965 RELATING TO THE SUSPENSION OF LITERACY TESTS AND OTHER "TESTS AND DEVICES" DETERMINING ELIGIBILITY TO VOTE ARE A PROPER EXERCISE OF CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT

The principles just stated establish that the right of the States to regulate their own elections is subject to constitutional limitations and that the Fifteenth Amendment, in particular, authorizes Congress to intervene in appropriate circumstances. It remains to show that the Voting Rights Act, insofar as it suspends literacy tests and comparable prerequisites to voting in some States, does not overreach the boundaries of congressional power or operate arbitrarily. We turn first to the substantive question of power.

A. CONGRESS MAY SUSPEND STATE USE OF A LITERACY TEST OR COMPARABLE REQUIREMENT AS A QUALIFICATION FOR VOTING WHERE APPROPRIATE TO PREVENT ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

The Fifteenth Amendment outlaws voting discrimination, whether accomplished by procedural or substantive means. "It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U.S. 268, 275. See, also, *Gomillion* v. *Lightfoot,* 364 U.S. 339; *Alabama* v. *United States,* 371 U.S. 37. And it likewise condemns discriminatory "qualifications." Thus, the restriction of the franchise to whites in the Delaware Constitution had to bow before the Fifteenth Amendment. See *Neal* v. *Delaware,* 103 U.S. 370. So did the "grandfather clauses" of the Oklahoma and Maryland Constitutions, also substantive qualifications. *Guinn* v. *United States,* 238 U.S. 347; *Myers* v. *Anderson,* 238 U.S. 368. Nor are only the most obvious devices reached. As the Court said in *Lane* v. *Wilson, supra,* "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." There is no basis for the claim that present literacy tests and similar requirements are any more insulated when they are used as engines for discrimination.

1. A literacy test may operate as an engine of racial discrimination

To be sure, in *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, the Court found no fault with a literacy qualification, as such, but it recognized that

even "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53. See, also, *Gray* v. *Sanders,* 372 U.S. 368, 379. Indeed, as the opinion in *Lassiter* notes, the Court had earlier affirmed a decision annulling Alabama's educational qualification on the ground that it was "merely a device to make racial discrimination easy." 360 U.S. at 53. See *Schnell* v. *Davis,* 336 U.S. 933, affirming 81 F. Supp. 872. And, only last Term, the Court voided one of Louisiana's educational tests. *Louisiana* v. *United States,* 380 U.S. 145. See, also, *United States* v. *Mississippi,* 380 U.S. 128.

In light of the decided cases, it need hardly be demonstrated that literacy tests open the door to discrimination by local registrars. The vague "interpretation" or "understanding" tests recently in vogue in Louisiana and Mississippi offer perhaps the easiest opportunity for discrimination. But many of the same abuses are obviously possible under tests that require the applicant to complete an application form (as in Virginia, Alabama, Mississippi and Louisiana today) or to read and write a section of the State constitution (as in North and South Carolina today). As a matter of history, the various forms of literacy test adopted by the Southern States were all considered effective engines of discrimination against the Negro franchise. Indeed, the so-called "constitutional interpretation test" was sometimes viewed as a convenient opening for the qualification of illiterate whites, rather than an obstacle to the Negro applicant—against whom a

reading and writing test or application form requirement was deemed a more effective barrier. That seems to have been the approach of the South Carolina constitutional convention of 1895 (see the Statement, *supra*, pp. 20–22). At all events, it is clear that those who wrote the South Carolina literacy tests now in effect understood its potential as an engine of racial discrimination (*supra*, pp. 18–22).

Discrimination through the abuse of literacy tests and comparable devices is no mere theoretical possibility. It is an indisputable historical fact that these tests were conceived and used in the South to bar Negroes from the franchise.[30] Until 1890, all the States of the old Confederacy enjoyed virtually universal manhood suffrage—albeit crude forms of intimidation were attempted to keep the Negro from voting. But in that year Mississippi led the way with its "understanding" test, adopted for the avowed purpose of discriminating against the Negro. See *United States* v. *Mississippi*, 380 U.S. 128, 144. And as the other States with substantial Negro popula-

[30] That was foreseen by the Congress as early as 1866 when Section 2 of the Fourteenth Amendment was submitted. The central purpose of that provision—which assessed an apportionment penalty against States denying the vote on grounds other than alienage, minority or conviction—was to discourage disfranchisement of the new freedmen; the penalty was not confined to outright racial disqualifications in recognition of the possibility that the Negro might be as effectively barred from voting by more indirect means, including literacy tests. See Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 94–103.

tions—including South Carolina in 1895—followed suit,[31] they were usually no less candid about their purpose. See, *e.g.*, Virginia Constitutional Convention (Proceedings and Debates, 1901–1902) 18, 2972, 3076–3071, and the excerpts from the proceedings of the South Carolina Constitutional Convention of 1895 reproduced in the Statement, pp. 17–22.

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[31] The basic chronology of literacy tests and similar requirements in the Southern States is as follows:

1. *Reading and/or writing:* Mississippi (1890), South Carolina (1895), North Carolina (1900), Alabama (1901), Virginia (1902), Georgia (1908), Louisiana (1921). And see Oklahoma (1910).

2. *Completion of an application form:* Louisiana (1898), Virginia (1902), Louisiana (1921), Mississippi (1954).

3. *Oral constitutional "understanding" and "interpretation" tests:* Mississippi (1890), South Carolina (1895), Virginia (1902), Louisiana (1921).

4. *Understanding of the duties and obligations of citizenship:* Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1954).

5. *Good moral character requirement* (other than nonconviction of a crime): Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1960).

At the same time alternative provisions for qualifying to vote were adopted to assure that illiterate whites were not disfranchised. Thus, in Louisiana, North Carolina, and Oklahoma, white voters were exempted from the literacy test by a "'voting' grandfather clause." La. Const. 1898, Art. 197, Sec. 5; N.C. Const. 1876, Art. VI, Sec. 4, as amended in 1900; Okla. Const. 1907, Art. III, Sec. 4a, as amended in 1910. The same result was accomplished in Alabama, Georgia, and Virginia by the so-called "'fighting' grandfather clause." See Ala. Const. 1901, Sec. 180; Ga. Const. 1877, Art. II, Sec. 1, para. IV (1–2), as amended in 1908; Va. Const. 1902, Sec. 19. Several of these States provided a separate exemption from the literacy requirement for property holders. See La. Const. 1898, Art. 197, Sec. 4; Ala. Const. 1901, Sec. 181, Second; Va. Const. 1902, Sec. 19, third; Ga. Const. 1877, Art. II, Sec. 1,

Nor was the expectation of those who devised these tests disappointed in subsequent experience. To be sure, for a time, literacy and comparable qualification tests remained dormant while cruder expedients—like the "grandfather clause" and the "white primary"—barred the Negro from effectively exercising the franchise. But when those devices were outlawed, the literacy tests were revived. See, *e.g.*, *Louisiana* v. *United States,* 380 U.S. 145, 148–149. And now—perhaps more than originally had been thought necessary [32]—they were applied "with an evil eye and an unequal hand." The cases decided in this Court alone sufficiently attest the fact. See *Schnell* v. *Davis,* 336 U.S. 933; *United States* v. *Thomas,* 362 U.S. 58;

Para. IV(5). And Alabama and Georgia additionally exempted persons of "good [moral] character" who understood "the duties and obligations of citizenship under a republican form of government." Ala. Const. 1901, Sec. 180, Third; Ga. Const. 1877, Art. II, Sec. 1, Para. IV(3), as amended in 1908. Another device, invented by Mississippi, and followed, for a time, by South Carolina and Virginia (and later Louisiana) offered white illiterates an opportunity to qualify by satisfying the registrar that they could "understand" and "interpret" a constitutional text when it was read to them. Miss. Const. 1890, Sec. 244; S.C. Const. 1895, Art. II, Sec. 4(c); Va. Const. 1902, Sec. 19, Fourth; La. Const. 1921, Art. VIII, Sec. 1(d). For later registrants, South Carolina substituted a property alternative. S.C. Const. 1895, Art. II, Sec. 4(d).

[32] The Negro illiteracy rate in 1890 in the seven Southern States which adopted these tests was as follows: Alabama, 78%; Louisiana, 77%; Georgia, 75%; Missisippi, 74%; South Carolina, 73%; North Carolina, 70%; Virginia, 69%. These percentages were much higher than comparable figures for white illiteracy: Alabama, 19%; Louisiana, 19%; Georgia, 17%; Mississippi, 13%; South Carolina, 18%; North Carolina, 25%; Virginia, 15%. See Compendium of the Eleventh Census, Part III, p. 316.

Alabama v. *United States*, 371 U.S. 37; *Louisiana* v. *United States*, *supra*. See, also, *United States* v. *Mississippi*, *supra*. Moreover, in each of the 32 voting suits initiated by the Department of Justice since 1957 which have come to final judgment, the district court or the court of appeals has found discrimination in the use of those tests.[33] The same conclusion has been reached by all those who have investigated the problem (see *infra*, pp. 56–60).

[33] Alabama: *United States* v. *Alabama* (Macon Co.), 192 F. Supp. 677 (M.D. Ala.), affirmed, 304 F. 2d 583 (C.A. 5), affirmed, 371 U.S. 37; *United States* v. *Alabama* (Bullock Co.), 7 Race Rel. L. Rep. 1146, 1152 (M.D. Ala.); *United States* v. *Atkins*, 323 F. 2d 733 (C.A. 5) and supplemental decree on remand, 10 Race Rel. L. Rep. 209 (S.D. Ala.); *United States* v. *Penton*, 212 F. Supp. 193 (M.D. Ala.), supplemental decree *sub nom. United States* v. *Parker*, 236 F. Supp. 511 (M.D. Ala.); *United States* v. *Mayton*, 7 Race Rel. L. Rep. 1136, supplemental decree, 9 Race Rel. L. Rep. 1337 (S.D. Ala.); *United States* v. *Logue*, 344 F. 2d 290 (C.A. 5); *United States* v. *Cartwright*, 230 F. Supp. 873 (M.D. Ala.), supplemental decree *sub nom. United States* v. *Strong*, 10 Race Rel. L. Rep. 710; *United States* v. *Hines*, 9 Race Rel. L. Rep. 1332 (N.D. Ala.); *United States* v. *Ford* (C.A. 2829), 9 Race Rel. L. Rep. 1330 (S.D. Ala.), decided April 13, 1964, supplemental order, June 18, 1965.

Georgia: *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga.).

Louisiana: *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Ass'n of Citizens Councils*, 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning*, 206 F. Supp. 623 (W.D. La.); *United States* v. *Fox*, 211 F. Supp. 25 (E.D. La.), affirmed, 334 F. 2d 449 (C.A. 5); *United States* v. *Wilder*, 222 F. Supp. 749 (W.D. La.); *United States* v. *Clement*, 231 F. Supp. 913 (W.D. La.); *United States* v. *Crawford*, 229 F. Supp. 898 (W.D. La.); *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La.), affirmed, 380 U.S. 145. See also, *United States* v. *Ward*, 349 F. 2d 795 (C.A. 5).

Mississippi: *United States* v. *Mathis*, C.A. 6429, decided May

In the light of the overwhelming evidence that they were designed and used as engines for racial discrimination, it would be extraordinary if literacy tests and comparable requirements were somehow immune from legislative scrutiny under the Fifteenth Amendment because they seem innocuous on their face. The fact is, as the cases make plain, that a literacy test which is "used as a cloak to discriminate" (*Gray* v. *Sanders*, 372 U.S. 368, 379) stands on no different footing from any other test or device employed to the same purpose.

2. Where a literacy test or other test or device carries substantial danger of racial discrimination, Congress may prohibit its use entirely, as a means of enforcing the Fifteenth Amendment, for the period necessary to remedy, and prevent revival of, the unconstitutional practice

The appropriateness of outlawing literacy tests which have been abused is largely settled by *Louisiana*

11, 1965 (N.D. Miss.); *United States* v. *Allen*, C.A. 6451, decided May 27, 1965 (N.D. Miss.); *United States* v. *Ramsey*, 331 F. 2d 824 (C.A. 5); *United States* v. *Lynd*, 301 F. 2d 818, 321 F. 2d 26 (C.A. 5), and decree on remand, July 16, 1965 (S.D. Miss.); *United States* v. *Ward*, 345 F. 2d 857 (C.A. 5), and decree on remand, May 25, 1965 (S.D. Miss.); *United States* v. *McClellan*, C.A. 3607, decided September 24, 1965 (S.D. Miss.); *United States* v. *Hosey*, C.A. 1248(E), decided July 31, 1965 (S.D. Miss.); *United States* v. *Clayton*, C.A. 6420, decided June 16, 1965 (N.D. Miss.); *United States* v. *Mikell*, C.A. 1922, decided March 16, 1965 (S.D. Miss.); *United States* v. *Duke*, 332 F. 2d 759 (C.A. 5), and decree on remand, May 29, 1964 (N.D. Miss.); *United States* v. *Campbell*, C.A. 633, decided April 8, 1965 (N.D. Miss.); *United States* v. *Cox*, No. D.C. 53–61, decided June 24, 1964 (N.D. Miss.) and decree of civil contempt entered August 13, 1965; *United States* v. *Mississippi*, 339 F. 2d 679 (C.A. 5), and decree on remand, C.A. 1656, decided March 16, 1965 (S.D. Miss.).

v. *United States,* 380 U.S. 145. That decision squarely sustains the propriety of enjoining all use of a test or device which was intended and has operated as an engine of racial discrimination. The basis for the prohibition is, of course, the danger of future abuse. Congress, with its broader legislative power to frame the remedy for an evil within its power to obviate, may certainly choose relief that would be within the power of a court.

It is not a sound objection that some of the suspended qualifications are susceptible of constitutional application and may sometimes have been constitutionally applied. It is a settled legal principle of general application that when important rights have been violated, the remedy may go beyond restraining the plainly unlawful conduct and prohibit associated acts which would be permissible at the hands of others or even the defendant if they had not been used to perpetrate the wrong. "Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *United States* v. *Bausch & Lomb Co.,* 321 U.S. 707, 724. "Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act." *May Department Stores Co.* v. *Labor Board,* 326 U.S. 376, 391. See, also, *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 188; *United States* v. *United Gypsum Co.,* 340 U.S. 76, 88, 89; *Swift & Co.* v. *United States,* 276 U.S. 311. And see *Terry* v. *Adams,* 345 U.S. 461, 475–476 (opinion of Mr. Justice Frankfurter). The principle runs

through the whole body of our law. *E.g., Warner & Co.*, v. *Lilly & Co.*, 265 U.S. 526, 532.

If the judiciary has that power, it is also possessed by Congress under its power to enforce. The legislature may paint with a broader brush than the courts. See *Currin* v. *Wallace*, 306 U.S. 1; *United States* v. *Darby*, 312 U.S. 100, 121. It may take into account the practical problems of enforcement in drawing the boundaries of regulation even though it reaches conduct unobjectionable *per se*. As Mr. Justice Brandeis said for the Court in the *Assigned Car Cases*, 274 U.S. 564, 583, with respect to a legislative rule promulgated by the Interstate Commerce Commission:

> * * * in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

The same principle was approved with reference to Congressional legislation under the enforcement clause of the Eighteenth Amendment in *Everard's Breweries* v. *Day*, 265 U.S. 545. The Court there sustained against constitutional attack a general ban on traffic in malt liquors prescribed for "medicinal purposes," because it was appropriate legislation to enforce the Amendment's prohibition on intoxicating liquors "for beverage purposes"—even though there would obviously be *bona fide* prescriptions as well as efforts to circumvent the Amendment by nominally

"medicinal" transactions. See also, *Purity Extract Co.* v. *Lynch*, 226 U.S. 192.

Thus, in enforcing the Fifteenth Amendment Congress may forbid the use of voter qualification laws where necessary to meet the risk of violations of constitutional rights even though, in the absence of a danger of illegal conduct predicated upon the use of such tests, the same laws might be an exercise of powers reserved to the States. In the actual circumstances, disestablishment of such tests for a period of five years is a wholly appropriate remedy.

The underlying justification for this period of disestablishment was recognized in *Louisiana* v. *United States, supra,* 380 U.S. at 154–155. Where in the past the tests and devices have been applied with less rigor or have not been applied at all to whites, even-handed application to future registrants would leave the ballot available to less qualified whites than Negroes. That result would perpetuate abridgment of the right to vote on account of race.[34] Doubtless,

[34] The principle is well settled that, where there is no legitimate basis for distinguishing between classes, a condition which has been waived for one class must be waived for all. See, *e.g.*, *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239. Cf. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 461. Nor is there any novelty in applying the rule to correct violations of the Fifteenth Amendment. See *Lane* v. *Wilson*, *supra*, 307 U.S. at 275–276. Indeed, in *Lassiter* v. *Northampton Election Board*, 360 U.S. at 50, while upholding North Carolina's literacy test on its face, the Court was at pains to note that it was not condoning the application of the test to new applicants if persons exempted by the grandfather clauses were still voting:

"* * * If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless

also, the survival in any form of a test or device long used as a method of denying constitutional rights would in itself tend to deny equal voting opportunities by discouraging Negro applications.

What is more, after generations of following a hardened policy of discrimination against the Negro franchise, it would be exceedingly difficult for the most well-intentioned State administration to see that potential engines of racial discrimination were now administered fairly and equitably on a local level. The use of literacy tests and comparable devices to disenfranchise Negroes in areas where they constitute a substantial proportion of the voting age population is so ingrained as to make it impossible to assume that the practices of a century will be suddenly abandoned. Cf. *Eubanks* v. *Louisiana*, 356 U.S. 584. History teaches that habits of long standing are not so easily discarded. That is particularly true in the area of racial discrimination. Indeed, the history of the Fifteenth Amendment litigation in this Court alone indicates the durability of the policy of barring the Negro from the franchise by one means or another.[35] Moreover, whatever the appearances, so long

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she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment."

[35] That history includes violence (*United States* v. *Reese*, 92 U.S. 214; *Ex Parte Yarborough*, 110 U.S. 651), use of the "grandfather clause" (*Guinn*, *supra*; *Myers* v. *Anderson*, 238 U.S. 368), and the "white primary" (*Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461), resort to procedural hurdles (*Lane* v. *Wilson*, 307 U.S. 268), racial gerrymandering (*Gomillion* v. *Lightfoot*, 364 U.S. 339), improper

as the test involved is susceptible to manipulation, it is proper to take account of the "pressures" which a "politically dominant white community" can exert on local officials. *NAACP* v. *Alabama,* 357 U.S. 449, 463; *Bates* v. *Little Rock,* 361 U.S. 516, 524; *Louisiana* v. *NAACP,* 366 U.S. 293, 296; *NAACP* v. *Button,* 371 U.S. 415, 435–436; *Gibson* v. *Florida,* 372 U.S. 539, 548, at n. 3; *Anderson* v. *Martin,* 375 U.S. 399, 403; cf. *Shelton* v. *Tucker,* 364 U.S. 479, 487.

In sum, the principal reasons justifying a legislative period of suspension under continuing supervision are much the same as those which justify a court in taking comparable measures: in order to determine "whether the old discriminatory practices really [have] been abandoned in good faith * * * to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies and traditions of the State * * *." *Louisiana* v. *United States, supra,* 380 U.S. at 156.

There were, moreover, additional subsidiary reasons for the five-year rule. First, some of the qualifications included among the tests and devices are simply not susceptible of non-discriminatory application, at least at the present time. Clearly this is true of the requirement that registered voters must vouch for new applicants as applied in areas where practically

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challenges (*United States* v. *Thomas,* 362 U.S. 58), and, finally, the discriminatory use of tests (*Schnell* v. *Davis,* 336 U.S. 933; *Alabama* v. *United States,* 371 U.S. 37; *Louisiana* v. *United States, supra*).

no Negroes are qualified and no whites will serve as vouchers for Negroes. Second, in light of educational differences between whites and Negroes attributable to the public policies of the States involved, even a nondiscriminatory application of the tests would abridge Fifteenth Amendment rights. Third, Congress believed that it was inequitable to apply to Negroes tests and devices adopted while large numbers of Negroes were illegally disenfranchised, and that reinstatement of such tests should be permitted only after Negroes had been admitted to the franchise on the same terms as whites and had an appropriate opportunity to determine, with their fellow citizens, what qualifications should be imposed. S. Rep. No. 162, 89th Cong., 1st Sess. (1965), Pt. 3 16.

In all the circumstances, the disestablishment of literacy tests and comparable devices for five years was warranted. At least, the remedy is plainly within the bounds of the broad legislative discretion to select appropriate means to execute the command of the Fifteenth Amendment. No more is required than that the means be reasonably adapted to achieving the permissible end. (See p. 30 *supra*.)

B. THE VOTING RIGHTS ACT OF 1965 ESTABLISHES A FAIR AND REASONABLE PROCEDURE FOR DETERMINING WHEN AND WHETHER USE OF A LITERACY TEST OR SIMILAR TEST OR DEVICE SHOULD BE PROHIBITED BECAUSE OF THE DANGER OF ABRIDGEMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

Literacy tests (and also the other tests and devices described in Section 4(c)) are susceptible of constitutional use in fixing the qualifications of voters, but they also lend themselves to abuse as instruments of

racial discrimination violating the Fifteenth Amendment. Where that danger exists, Congress, as we have seen, has ample power to proscribe further use of the test as an enforcement measure. Given the ambivalent character of the tests, the legislative problem was to provide a swift, efficient and equitable procedure for suspending all use of the tests where they carried a substantial danger of discriminatory use while permitting their continuance in other instances.

Congress solved the problem by establishing two related phases in an essentially unitary procedure. First, under Section 4(a) the use of any test or device (including a literacy test) must be suspended whenever it is determined by the Attorney General and Director of the Census (1) that the State or a political subdivision maintained a test or device on November 1, 1964, and (2) that in the November 1964 Presidential election less than half the adult population participated. This initial step provides a simple and expeditious method of separating those States and political subdivisions where the use of a test or device carries substantial danger of violations of the Fifteenth Amendment from those in which the danger, if any, is significantly less serious. But the first phase is only temporary. Recognizing that the determinations triggering suspension might be imperfect guides to the actual danger, Congress, in Section 4 (a) and (d), offered any State or subdivision as to which the determinations had been made the opportunity to submit the issue of past abuse and consequent danger of future violation to judicial examination: it provided that the suspension should cease

if the United States District Court for the District of Columbia should find that the test or device had not been used in a discriminatory fashion during the preceding five years except in limited and speedily corrected instances. In this second phase of the procedure, therefore, there is a full judicial inquiry into the critical question whether the test or device operates only as a legitimate test of voter qualifications or carries a significant danger of continued violation of the Fifteenth Amendment. Each phase of the procedure, understood in its context, not only bears a reasonable relation to the prevention of violations but operates in a fair and rational manner.

1. Congress had ample basis for concluding that where the maintenance of a test or device coincided with the participation of only half the population in a Presidential election, there was sufficient danger that the test was being used as an instrument of racial discrimination to warrant suspending it unless and until freedom from abuse could be proved.

The power of Congress to suspend a test or device which may be a vehicle of racial discrimination is not dependent upon proof that the test is actually being used to defeat the Fifteenth Amendment. Congress may deal with dangers—with tendencies and probabilities—at least where the restriction is not wholly disproportionate to the danger to be met. This principle is an established part of our constitutional law. In *North American Co.* v. *SEC,* 327 U.S. 686, 710–711, the Court held that the reorganization of a holding company, under the Public Utility Holding Company Act of 1935, was properly required

even though it had engaged in none of the evil practices which Congress sought to forestall since Congress could remove "what Congress considered to be potential if not actual sources of evil." "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *Id.*, 710–711. In the National Labor Relations Act Congress outlawed labor practices "which provoke or *tend to provoke* strikes" and "[lead] or *tend to lead* to labor disputes." *Labor Board* v. *Fainblatt,* 306 U.S. 601, 607, 608. Compare *Katzenbach* v. *McClung,* 379 U.S. 294, 301. In *United States* v. *Darby,* 312 U.S. 100, 121, the Court cited with approval the earlier decision in *Thornton* v. *United States,* 271 U.S. 414, upholding a law requiring the dipping of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle which might be infected. In *Board of Governors* v. *Agnew,* 329 U.S. 441, 449, the Court affirmed the enforcement of Section 32 of the Banking Act of 1933 as a "preventive or prophylactic measure" not requiring proof that a director had or would actually violate his fiduciary duties because Congress could act "to remove tempting opportunities." Compare *De Veau* v. *Braisted,* 363 U.S. 144, 157–160, 160–161. The principle we invoke, which was applied in all these cases, is, of course, only a particular corollary of the broader proposition that legislation which offends no specific constitutional guaranty is valid if reason-

ably adapted to a permissible objective. See p. 30, *supra.*

Here the danger was continued racial deprivation of voting rights in urgent circumstances demanding immediate remedy. The triggering mechanism provided by Section 4(b) and the resulting automatic suspension of tests and devices pending judicial determination, if requested, are suited to that end.

(a) Low voter participation in a State maintaining a "test or device" for determining voting qualifications is a suitable interim guide to the danger of discrimination

The two determinations which trigger suspension under Section 4(b), while by no means conclusive, go far to show that the "test or device" maintained by the State is being used as an instrument of racial discrimination.

The "test or device."—The very existence of a "test or device" of the kind defined in Section 4(c) is evidence of substantial danger of violation of the Fifteenth Amendment in areas where officials may be disposed to deny Negroes the right to vote, for history shows that in States whose policy has been one of racial segregation all such tests and devices have repeatedly been adopted and used for the purpose of circumventing constitutional guarantees. We have already noted the consistent finding of the courts that such tests were used as engines of discrimination in the South (*supra,* pp. 44–45, n. 33). The records in these cases and other voluminous evidence of the abuse of a variety of tests and devices was before Congress when it considered the Voting Rights Act in 1965.

Literacy tests are no better than others. The Chairman of the United States Civil Rights Commission testified that the tests and devices defined in Section 4(c) of the Act "have been the most widely used and most widely abused." He added: "* * * [W]e have found that literacy tests are the one great universal device used for denying Negroes the right to vote." (Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (1965) 266. See, also *id.* at 125–127, 259, 267). Similarly, the Attorney General, on the basis of experience in the administration of the Civil Rights Acts of 1957 and 1960, testified (*id.* at 119–120)—

> I know that in some of these instances, some of these States, * * * the literacy tests have not been applied to white applicants who are presently on the books but they have been applied, not merely applied but applied in an improper manner, to Negro applicants, to keep them off the register.

It was also noted that these voting qualifications had first been adopted in the southern States in the 1890's,[36] when at least 69% of the adult Negroes but at most 25% of the adult whites were illiterate.[37] Had they been applied even-handedly to all persons desiring to vote, there might be room for argument that the purpose was not enough to invalidate a qualification required of all voters. But there was no intention to apply literacy tests even-handedly. This is shown, first, by the declarations of their sponsors

[36] See note 31, *supra*, p. 42.

[37] See note 32, *supra*, p. 43.

explaining how the programs embracing literacy tests would operate. In South Carolina, for example, Senator Tillman described the constitutional requirement that an applicant for registration show that "he can both read and write any Section of this Constitution submitted to him by the registration officer" as one which would operate to disenfranchise Negroes and explained the opportunities opened by the related understanding test:

> * * * If you put in here that a man must understand, and you vest the right to judge whether he understands in an officer, it is a constitutional act. That officer is responsible to his conscience and his God, he is responsible to nobody else. There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps [laughter], or discriminating.[38]

The Virginia convention was given a like explanation of the understanding test (Virginia Constitutional Convention of 1901–1902, *Proceedings* 2972):

> I do not expect an understanding clause to be administered with any degree of friendship by the white man to the suffrage of the black man* * *; I would not expect an impartial administration of the clause.

Bearing in mind the use of trivial mistakes in application blanks to bar Negro applicants (see Brief for the United States in *United States* v. *Mississippi*, No. 73, October Term, 1964, at 30–31), there can be no doubt that the closely related literacy tests were also

[38] *Journal of the South Carolina Constitutional Convention of 1895* at 469.

believed to present "tempting opportunities" for discrimination.

The discriminatory purpose and operation of literacy tests is further evidenced by the use of exceptions designed to permit the registration of white illiterates. The cruder versions contained "voting grandfather" or "fighting grandfather" clauses. Other devices exempted persons of "good moral character" who understood "the duties and obligations of citizenship" or persons who could understand a constitutional text when it was read to them. Another form of exception, still carried forward by South Carolina, permits illiterates to vote who meet a property qualifications.[39]

A wealth of evidence was presented at the hearings or otherwise available to Congress showing specific instances in which tests of literacy (although often called by other names) were used as engines of racial discrimination. For example, the House Judiciary Committee Report noted that in Selma, Alabama, after most whites but few Negroes had been registered under lax standards, subsequent Negro applicants for registration "were required to spell such difficult and technical words as 'emolument,' 'impeachment,' 'apportionment,' and 'despotism.'" H. Rep. No. 439, 89th Cong., 1st Sess. (1965) at 11. And the Senate Report found that (S. Rep. No. 162, Pt. 3, 89th Cong., 1st Sess. (1965) at 10):

> * * * the application form has often been used as a test which only Negroes must "pass" in order to qualify. In *United States* v. *Alabama*,

[39] See *infra*, p. 107.

> * * * the court of appeals found that the requirement of filling out a lengthy application form 'became the engine of discrimination' because whites 'were given frequent assistance in determining the correct answers' whereas 'Negroes not only failed to receive assistance, [but] their applications were rejected for slight and technical errors' (304 F. 2d 587). Similarly, in Panola County, Miss., the court of appeals found the application form 'was treated largely as an information form when submitted by a white person' but as 'a test of skill for the Negro' (*United States* v. *Duke*, 332 F. 2d 759, 767 (C.A. 5)).

In *United States* v. *Alabama*, 192 F. Supp. 677 (M.D. Ala.), 304 F. 2d 583 (C.A. 5), *affirmed*, 371 U.S. 37, quoted in the same Senate Report quoted, the Court found the Alabama requirement that an applicant "demonstrate that he can read and write any Article of" the United States Constitution to be an "engine of discrimination" (304 F. 2d at 586). The district court also described how this literacy test was racially manipulated (192 F. Supp. at 680):

> Aside from the 1954–1955 period when no applicants were required to write provisions of the Constitution, Negroes were invariably required to copy a provision of the United States Constitution, and more often than not that provision was Article II. On the other hand, white applicants were often permitted to to prove their ability to read and write by writing a shorter passage of the Constitution or by completing the application form without a writing test at all. Appendix "B" to this

> opinion sets out a list of 48 applications of white persons who were not required to take any writing test whatever; this appendix also sets out 17 applications of Negroes all of whom had to write an article of the Constitution and many of whom had to write Article II.

See, also, H. Rep. 439 at 12; S. Rep. 162, Pt. 3, at 10–12; House Hearings at 7; Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st. Sess. (1965), at 11 (testimony of the Attorney General). This is the same kind of literacy test prescribed by South Carolina Code § 23–68.

Professor Key, after a careful study concluded (*Southern Politics* (1949) 576):

> No matter from what direction one looks at it, the southern literacy test is a fraud and nothing more. The simple fact seems to be that the constitutionally prescribed test of ability to read and write a section of the constitution is rarely administered to whites. It is applied chiefly to Negroes and not always to them. When Negroes are tested on their ability to read and write, only in exceptional instances is the test administered fairly. * * *

It follows that the first fact required to be found before Section 4(a) was set in motion—the existence of a test or device applicable in the State or a subdivision—itself demonstrates a substantial risk of violations of the Fifteenth Amendment.

Low voter participation.—The second fact—low participation in the Presidential election of 1964—points in the same direction. There were only nine States in which less than half the adult population voted in the Presidential election. Other explana-

tions may be equally likely when one considers this fact alone, but such low participation at least suggests that in those States a large class (or classes) of citizens was barred from the polls. Three other aspects of the data indicate a strong probability that much of the low participation resulted from the discriminatory use of tests or devices. Of the nine States seven maintained a test or device within the definition in Section 4(c)—Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia. While this might be taken to suggest only a correlation between any use of a test or device and low participation in the electoral process, the explanation is disproved by the fact that of the twenty-one States maintaining a test or device only the seven named had less than half their adult population participating in the 1964 Presidential election. In the other 14 the ratio of participation was higher than the national average. Some further explanation is therefore required. The likelihood that the cause is discriminatory use of the test or devices in States with less than 50% adult participation is strongly suggested by the fact that in six of the seven States 63% of the adult whites but only 25% of the adult Negroes were registered in 1964 (by computation from statistics in Senate Hearings 1472).

It is possible, of course, that tests and devices, even though fairly administered, bore harder upon Negroes than whites in the six Southern States. But Congress in choosing between the two conflicting inferences was not required to blind itself to familiar history. All six States had long maintained official policies of racial segregation extending from the

school house to the graveyard.[40] All six had long resorted to other discriminatory devices for denying Negroes equal voting rights.[41] Public officials and political leaders had repeatedly evidenced their pur-

[40] See Appendix J, Senate Report 162 (Part 3), p. 49, setting out statutes in, *inter alia*, Alabama, Georgia, Louisiana, Mississippi and South Carolina requiring segregation in transportation, and travel facilities, recreational facilities, schools and hospitals. See also, Supplemental Brief for the United States as Amicus Curiae in *Griffin* v. *State of Maryland*, *Barr* v. *City of Columbia*, *Bouie* v. *City of Columbia*, *Bell* v. *Maryland and Robinson* v. *Florida*, Nos. 6, 9, 10, 12, and 60, October Term, 1963. Note especially pp. 45–63 which set out in detail State statutes and local ordinances throughout the South directed at curtailing the Negro's participation in the life of the community by limiting his legal rights, his freedom to engage in the trade or business of his choice, his access to various kinds of buildings and public accommodations, in short, the whole range of Black Codes and Jim Crow laws.

[41] For a discussion of the "white primary" in Alabama, Georgia, North Carolina, South Carolina and Virginia and the attempt by these States to maintain white supremacy in their Democratic primaries following the decision in *Smith* v. *Allwright*, *supra*, see *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875; *Brown* v. *Baskin*, 78 F. Supp. 933, 80 F. Supp. 1017 (E.D.S.C.), affirmed *sub nom Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4); *West* v. *Bliley*, 33 F. 2d 177 (E.D. Va.), 42 F. 2d 101 (C.A. 4); Key, *Southern Politics* (1949) 619–643; Weeks, *The White Primary*, 8 Mississippi Law Journal 135–153; Weeks, *The White Primary: 1944–1948*, 42 *American Political Science Review* 500–510 (1948).

The history of Louisiana's efforts to disfranchise Negroes at the polls is described fully by Judge Wisdom in *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La.) affirmed, 380 U.S. 145. Mississippi's efforts are detailed by Judge Brown in his dissent in *United States* v. *Mississippi*, 229 F. Supp. 925, 974 (S.D. Miss.), reversed, 380 U.S. 128.

Various other methods used to circumvent the Fifteenth

pose to maintain white supremacy at the polls. The tests and devices, moreover, had been adopted, and were readily and often used, as engines of discrimination. Under such circumstances, it was certainly permissible for Congress to infer that the low voter participation probably resulted from racial discrimination in the use of the tests.

The inference is confirmed by the available direct evidence. Despite its limited resources for so huge a task and the difficulties of investigation and proof, in five of the six States the Department of Justice had found evidence of racial discrimination in voting. Litigation had been initiated in four States, and in each of the 32 actions which has gone to final judgment, there have been findings of discriminatory use of tests and devices.[42] Senate Hearings, 1447–1534; S. Rep. 162, Pt. 3, 13–14. These facts illumined the direct testimony of expert witnesses: (1) that the areas in which use of tests and devices and distinctly low voter participation coincided were those in which there was reason to apprehend the most serious racial

Amendment are well documented in the reports of this Court. See note 35, *supra*, p. 49.

[42] See note 33 at pp. 44–45, *supra*.

discrimination in voting and (2) that there appeared to be a causal relationship. House Hearings 12, 24, 26–27, 88, 258, 265, 273. Senate Hearings 1447–1534 (especially pp. 1447–1455 containing "Explanation of Attached Tables Demonstrating that there is a High Probability of Voting Discrimination Where the Use of 'Tests or Devices' Coincides with Low Voter Participation").[43]

Congress was not unmindful of South Carolina's argument that the triggering mechanism in Section 4(b) is unreasonable because it fails to recognize that participation of South Carolina's citizens in elections is affected by factors such as their low level of education and income (Plaintiff's Brief, pp. 18–19 and Appendix C). The argument was made in Congress and rejected.[44] It contains numerous fallacies. One

[43] South Carolina suggests (Brief in support of motion for leave to file complaint, p. 54) that voting in primaries would be a more accurate gauge of access to the franchise, at least in predominantly one-party States. However, the most recent statistics supplies by South Carolina (Exhibit C–1 to the Complaint) show that in 1962 24.69% of the adult population voted in the general elections and 25.92% voted in primary elections. In devising a rule of nationwide applicability it is unnecessary for Congress to observe such fine distinctions. Actual participation in voting is a more accurate indicator of access to the franchise than registration figures because of the common failure of local officials to remove from the rolls the names of persons who have died or moved away. House Hearings 328; Senate Hearings 587, 596, 599–600, 602.

[44] See, *e.g.*, Senate Hearings, 32–37 (poll tax, lack of political contests, apathy, low education); 111 Cong. Rec. 8079 (daily ed. 4/23/65) (lack of political contests); *id.* at 11303 (daily ed. 5/26/65) (inability of aliens and military personnel to vote); *id.* at 11305 (daily ed. 5/26/65) (low education and distant registration offices in rural counties).

of them is that, although all the factors bearing upon the situation of Negroes in South Carolina may well contribute to low Negro registration and participation in voting, Congress was required to determine only whether the participation of less than half the voters evidenced a sufficiently substantial danger that the test or device was an engine of racial discrimination to warrant its suspension pending more careful inquiry (should the State wish to contest the existence of such a danger). The presence of other contributing factors is not inconsistent with substantial danger of racial discrimination.

In framing an enforcement measure to bar the use of a test or device to violate the Fifteenth Amendment, Congress, moreover, could properly take into account the fact that the causes cited by South Carolina for low Negro participation in voting—inferior educational attainment and income—are themselves related to official racial discrimination violating the Fourteenth Amendment, another evil which Congress has legislative power to redress. (Amend. XIV, Sec. 5.)[45] South Carolina's own brief makes

[45] Congress was well aware of the relationship between violations of the Fourteenth and Fifteenth Amendments. During the Senate debate Senator Bayh called attention to it (111 Cong. Rec. (daily ed.) 8198:

"Sumter County, Ala., provides an excellent illustration. In 1935, there were 536 white and 5,400 Negro children enrolled in elementary schools in Sumter County. For every 21 white students there was 1 teacher. There was only 1 teacher for every 45 Negro students. The white teachers were paid nearly five times as much as Negro teachers. Expenditures per pupil were even more discouraging. While $75 per pupil was appro-

it clear that the low average educational attainment of her citizens is largely a matter of race. She reports that the median number of school years completed by white persons 25 years of age or older is 10.3 (just below the national average), whereas for

priated for white students, $4 per pupil was appropriated for Negro students.

"Certainly the great weight of responsibility for equal opportunity in the country today is in the area of additional educational opportunities. The figures which I have stated portray as dramatic evidence of unequal opportunity as any that I have discovered.

"In 1950, the story was not changed. It was modified somewhat. While the disparity was not as great in 1950 as it was in 1935, it remained. For every 21 white students there was 1 teacher. There was 1 teacher for every 30 Negro students. A Negro teacher received approximately two-thirds the compensation received by a white teacher. While $198 per pupil was appropriated for white students, $63 per pupil was appropriated for Negro students. Likewise, expenditures to provide transportation to and from schools were higher for whites than Negroes and school sessions were longer for whites than for Negroes.

"Yet, in order to vote in Sumter County, Ala., under State law a Negro would have to take the same educational achievement test that is administered to whites. These States cannot have it both ways. They cannot, on the one hand, provide their Negro citizens with an inferior education, while at the same time, require them to pass a stiff educational test as a prerequisite to the exercise of the right to vote. As the Attorney General said to the Judiciary Committee:

"'Years of violation of the 14th amendment would become the excuse for continuing violation of the 15th amendment right to vote.'

"Even a fairminded Federal examiner could not fairly administer a literacy or informational test under these conditions. The bias is built in."

See also Senate Hearings 22; House Hearings 16; S. Rep. 162, Pt. 3, 16.

non-white persons it is 5.9 (Br. pp. 46–47). Thus, South Carolina herself suggests that low voting participation is attributable largely to non-participation by the State's Negro population. These figures coincide with an historic policy of segregated education. South Carolina's constitution (Article XI, Sec. 7) and statutes (S.C. Code 21–751 (1962)) still provide for enforced segregation. Although the Board of Education of Clarendon County, South Carolina, was one of the original defendants in the school desegregation cases (*Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294) not a single school in South Carolina was desegregated prior to 1963. At the present time 6 out of a total of 107 school districts have been desegregated by court order. In each of those cases an affirmative and continuing public policy of segregated education was found.[46] Nor is it irrelevant that South Carolina, by statute and ordinance, has long officially supported the caste system which relegates Negroes to an inferior social and economic position.[47] In States maintaining and

[46] See *Brunson* v. *School District 1 of Clarendon County*, 311 F. 2d 107 (C.A. 4), certiorari denied, 373 U.S. 933; *Brown* v. *School District 20 of Charleston County*, 226 F. Supp. 819 (E.D.S.C.), affirmed, 328 F. 2d 618 (C.A. 4), certiorari denied *sub nom. Allen* v. *Brown*, 379 U.S. 825; *Stanley* v. *Darlington County School District*, 9 Race Relations L. Rep. 1293 (E.D.S.C.); *Randall* v. *Sumter School District No. 2*, 232 F. Supp. (E.D.S.C.), 241 F. Supp. 787; *Whittenburg* v. *School District of Greenville County*, 9 Race Relations L. Rep. 719 (W.D.S.C.); *Adams* v. *Orangeburg County School District No. 5*, 232 F. Supp. 692 (E.D.S.C.).

[47] Even in the twentieth century the caste system has restricted the South Carolina Negro at every turn. He began life in neighborhoods segregated by law. See, *e.g.*, City Code of

enforcing a public policy of racial segregation in the economic, educational and social activities of the community, the disfranchisement of the Negro would appear to be as much the cause as the effect of his low economic and educational status. Certainly it is not unreasonable to anticipate that a group denied access to the principal and most effective mode of political expression will eventually be shortchanged in other areas affected by State action. See Myrdal, *The American Dilemma* (1962), pp. 435–436. Conversely, opening the polls tends to correct other denials of equal protection.

We do not suggest that the constitutionality of the triggers leading to temporary suspension of tests and devices defined in Section 4(c) rests upon the fact that the States to which they apply have engaged in other forms of unconstitutional racial discrimination. The critical question remains whether the triggers and temporary suspension are reasonably adapted to the constitutional end of eliminating a significant danger that South Carolina's literacy test is an instrument of racial discrimination violating the Fifteenth Amendment. In determining the relationship of means to end, however, it is appropriate to

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Spartanburg, S.C. (1949) § 23–51. He attended segregated schools. S.C. Code (1962) § 21–751. He could play only in parks designated for his race. *Id.*, § 51–2.4. He was kept apart at work. See, *e.g.*, *id.*, § 40–452. He was kept apart while traveling (*id.*, §§ 58–714, 58–1331)—except while accompanying a white child (*id.*, § 58–1333). Operators of station restaurants, under pain of fine or imprisonment, might not furnish the Negro meals "in the same room, at the same table or at the same counter" with whites. *Id.*, § 58–551. He was required to worship apart (see, *e.g.*, City Code of Greenville, S.C. (1953), § 31-5), and to be buried apart (*id.*, §8–1).

consider not only the affirmative connection but also the fact that the measure, to the limited extent that it misses the mark or sweeps more broadly than intended, will tend to remedy other constitutional violations.

(b) The urgency of prompt enforcement required immediate suspension of all tests and devices, pending full judicial determination, where the guides most readily available indicated danger of continuing violations

In weighing the relationship of the triggers to the objective of preventing the use of voting tests and devices as instruments of racial discrimination while permitting their operation where there was no significant danger of abuse, Congress properly gave weight to the urgent need for a general and immediate remedy for the demonstrated widespread use of tests and devices as instruments for abridging the right to vote by reason of race or color. Congress fully realized that the triggering facts, even when considered in context (pp. 55–64, *supra*), were not certain proof of violations. Given time, careful investigation, and court review, it might turn out that the triggers swept more broadly than necessary and that a State such as South Carolina did not in fact use its literacy test as an engine of discrimination. Congress provided for such an inquiry, at the request of a State, in Section 4 (a) and (d). The function of the triggers and suspension pending the outcome of litigation is simply to meet an extraordinarily urgent situation.

The President's Message to Congress on March 15, 1965, stated the basic facts (H. Doc. 117, 89th Cong., 1st Sess., p. 8):

(1) That the 15th amendment of our Constitution is today being systematically and willfully circumvented in certain State and local jurisdictions of our Nation.

(2) That representatives of such State and local governments, acting "under the color of law," are denying American citizens the right to vote on the sole basis of race or color.

(3) That, as a result of these practices, in some areas of our country today no significant number of American citizens of the Negro race can be registered to vote except upon the intervention and order of a Federal court.

(4) That the remedies available under law to citizens thus denied their constitutional rights—and the authority presently available to the Federal Government to act in their behalf—are clearly inadequate.

(5) That the denial of these rights and the frustration of efforts to obtain meaningful relief from such denial without undue delay is contributing to the creation of conditions which are both inimical to our domestic order and tranquillity and incompatible with the standards of equal justice and individual dignity on which our society stands.

The subsequent hearings and debates developed abundant evidence that, notwithstanding intensive litigation under the voting provisions of the Civil Rights Acts of 1957, 1960 and 1964, the promise of the Fifteenth Amendment remained largely unfulfilled and that, at the prevailing rate of progress, large numbers of Negroes were doomed to lifelong disfranchisement (see House Hearings 5–9, 66, 258, 287, 307, 436; Senate Hearings 9–14). Thus, in 100

counties, between 1956 and 1963 Negro registration had increased from 5% to 8.3%, leaving more than 600,000 adult Negro residents still disenfranchised. *1963 Report of the United States Commission on Civil Rights* 14–15. Negro registration in Alabama, where 12 voting rights actions had been commenced by the Department of Justice, increased by only 9.2% to a total of 19.4% between 1958 and 1964—whereas more than 69% of the adult white population of Alabama is registered. Similarly, Negro registration in Mississippi, despite 22 voting rights suits initiated by the Department of Justice, barely increased from 4.4% in 1954 to 6.4% in 1964—while more than 70% of the adult white population is registered. And in Louisiana (where more than 80% of the adult white population is registered) 14 such actions had inched Negro registration from 31.7% to 31.8% in 1965. S. Rep. No. 162, Pt. 3 at 6; House Hearings 4, 32, 257. The testimony also shows that this record of failure was attributable to the delays inherent in case-by-case litigation, to the difficulties in policing judicial decrees, and to the intransigence and evasions of local officials. House Hearings 51, 60; Senate Hearings 9–14; S. Rep. 162, Pt. 3, 6–9. Any possibility of attributing the low registration of Negroes to indifference to the franchise is negatived by the widespread public demonstrations against continued denial of constitutional rights.

The problem facing Congress was epitomized by developments in Dallas County, Alabama, whose county seat is Selma. Dallas County had a voting-age population of approximately 29,500, of whom 14,400

were white persons and 15,100 were Negroes. As of 1961, 9,195 whites—64 percent of the voting age total—and 156 Negroes—1 percent of the total—were registered to vote. The racial discrimination inferable from these statistics was confirmed by a Department of Justice investigation, and suit was brought on April 13, 1961. Thirteen months later the district court refused all relief. Two and one half years after suit was instituted, the court of appeals reversed and ordered the entry of an injunction. A second trial documented the discriminatory misuse of tests and devices since entry of the decree, and on February 4, 1965, almost four years after suit was first brought, the district court entered a decree enjoining use of the complicated literacy and knowledge-of-government tests. Even then there were major delays and obstacles to Negro registration. The government was required to apply for supplemental orders on several further occasions.[48] There were demonstrations, violence and dangerous tensions, followed by the historic march from Selma to Montgomery. The example of Dallas County was often cited in Congress as evidence of the ineffectiveness of existing methods of enforcement and the need for swift relief.

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[48] During some of the period Negroes were intimidated from appearing at the registration office. See *Williams* v. *Wallace*, 340 F. Supp. 100 (M.D. Ala.). In *United States* v. *Clark*, 10 Race Rel. Rep. 236 (April 16, 1965), a three-judge court enjoined Sheriff Clark and his deputies and posse from harassing Negroes in the exercise of their constitutional rights. At this time, two other Dallas County voting intimidation cases are pending decision in the Fifth Circuit. *United States* v. *McLeod*, No. 21475 (argued March 24, 1965); *United States* v. *Dallas County*, No. 21477 (argued March 24, 1965).

Even where litigation was initiated on a State-wide basis the delays were long and frustrating. The complaint in *United States* v. *State of Mississippi* was filed on August 28, 1962. On September 6, a three-judge court was designated to hear the case. The defendants were granted two extensions of time in which to plead, giving them a total of 60 extra days. On November 19, 1962, the defendants filed motions to dismiss the case and for a more definite statement, severance, the striking of parts of the complaint, and a change of venue. On March 12, 1963, seven months after suit was filed, some of the motions were denied and decision was deferred on others. Under the order, discovery proceeded while the motions were pending. On October 30, 1963, all pending motions were argued, including the motions to dismiss but it was not until March 6, 1964, a year and a half after suit was filed, that the district court entered judgment dismissing the complaint for failure to state a claim. The government appealed and on March 8, 1965, this Court unanimously reversed the district court's dismissal of the case and remanded the case for trial. At the time Congress acted, the three years of litigation had produced an important ruling but no practical enforcement of the Fifteenth Amendment. One could only speculate how much longer it would be before a final decree was entered.

Further delay in halting the widespread violations of the Fifteenth Amendment would do irreparable injury both to the victims of the discrimination and to the integrity of our political processes. The depth of the injustice resulting from any further exclusion of

a large class of citizens upon the most invidious of grounds was evidenced, if evidence were needed, by the reaction in Selma, Alabama, the March to Montgomery and similar demonstrations. What was needed was a clear-cut formula which would work with reasonable accuracy during any period required for investigation and more refined classification. The constitutional objective which Congress was entitled to pursue was not compliance eventually but *enforcement now.*

Under such circumstances Congress might well have chosen to outlaw all use of tests and devices for a specified period where they carried the degree of risk of violations inferable from the triggering facts and their known historical context. It is no objection that there might be instances of violations not brought under Section 4. Congress could provide this remedy for the States and counties where the danger was apparently greatest, leaving the Department of Justice free to litigate other violations under Section 3 of this Act and under the voting rights provisions of prior legislation.

> * * * Evils in the same field may be if different dimensions and proportions, requiring different remedies. Or so the legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. [*Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.]

See *United States* v. *Darby*, 312 U.S. 100, 121; *Currin* v. *Wallace*, 306 U.S. 1.

Nor is it a fatal objection that the suspension might not be appropriate in every instance because the reasonably apparent danger was actually unreal. We have already stated the principle that legislation may draw practical lines that sometimes reaches innocent conduct (*supra*, pp. 46–48, 53–55). Congress may employ means which, "although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." *United States* v. *Darby*, 312 U.S. at 121. See, also, *Currin* v. *Wallace*, 306 U.S. 1. The urgency of the problem with which Congress was confronted—the massive and prolonged deprivation of a fundamental political right—warranted the solution which Congress adopted. Given the alternatives—on the one hand, permitting large numbers of citizens to be illegally deprived of the right to vote in elections of vital concern and, on the other, the risk that some unqualified persons in some areas might be registered—Congress could appropriately choose as it did.

In fact—we must emphasize once again—Congress refrained from permanently outlawing the dangerous tests and devices on the basis of the triggering determinations and chose to use them only as the best evidence available for an immediate, virtually automatic determination operating only for the period necessary to grant a State or political subdivision a

full judicial hearing under Sections 4 (a) and (d). We show presently that the judicial hearing provided affords a fair opportunity to establish, upon all the evidence, whether a literacy test or other device described in Section 4(c) carries sufficient danger of racial discrimination to warrant its disestablishment.

It follows that the interim measure of suspending the operation of tests and devices upon the triggering determinations, pending a judicial hearing, is a measure reasonably adapted to the permissible congressional objective of promptly arresting violations of Section 1 of the Fifteenth Amendment. Since the measure violates no other restriction upon the constitutional power, it is a valid exercise of the enforcement power conferred by Section 2.

Plaintiff's other objections to the triggering mechanism can be answered summarily. Where there was need for prompt action, the operative facts were readily susceptible of objective determination and the door was open to a judicial proceeding, there was no need to provide for judicial review of the determinations of the Attorney-General and Director of the Census. See *United States* v. *Bush & Co.,* 310 U.S. 371; *Schilling* v. *Rogers,* 363 U.S. 666, 674; *Choy* v. *Farragut Gardens,* 131 F. Supp. 609 (S.D.N.Y.). Plainly, Congress could accept the statistical processes of the Bureau of the Census, as it has done for other purposes such as the allocation of congressional seats.

Nor can it be successfully argued that these provisions of the Act constitute a bill of attainder prohibited by Article I, Section 9, Clause 3, because they inflict punishment on a legislatively predetermined class. The argument proves too much. If accepted, it would largely disable Congress from providing for the effective regulation of any activity. Most regulatory legislation establishes classifications on the basis of experience with past events which reveal a need for the imposition of future restraints. Surely Congress may undertake to restrict the production of cotton without, also, restricting the production of carrots. It may tax the sale of automobiles without taxing the sale of bicycles. The fact that the legislation was predicated on substantial evidence of need does not transform it into legislative adjudication. Congress left every State free to seek an adjudication of the applicability of the regulatory scheme in an Article III court. A bill of attainder must inflict punishment, and however broad the concept of punishment may be (see *United States* v. *Brown,* 381 U.S. 437), it surely does not embrace the burden of seeking such an adjudication.

It is worthy of note in this connection that although Congress was well aware of the States and even most of the counties likely to be initially affected by Section 4(b), the triggering standards were made to control objectively, just as in the case of any other legislation requiring classification. And at least in the case of counties it was entirely possible that

the list affected by the determinations would be somewhat different than suggested by early indications.[49]

2. The judicial proceeding authorized by Section 4(a) and (d) affords a State a fair opportunity to show that its literacy test (or any other test or device) is not sufficiently likely to be an instrument of discrimination to warrant disestablishment.

While Section 4(a) requires the suspension of any test or device described in subsection (c) immediately upon the determinations made by the Attorney General and Director of the Census under subsection (b), Section 4(a) also authorizes an immediate judicial inquiry into the reality of the apparent danger of abuse. When the judicial inquiry is completed, the court's final decree supplants the triggering mechanism as the determinant of whether the test or device shall be disestablished as a serious threat to Fifteenth Amendment rights or permitted as a *bona fide* measure of qualification to vote.

The legal principles outlined earlier in this brief make it plain that there is power to provide for disestablishment of a test or device which has been judicially determined to have been an engine of racial discrimination violating the Fifteenth Amendment.

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[49] Indeed, surveys conducted by the Bureau of the Census after the Voting Rights Act was enacted resulted in determinations that Aroostook County, Maine, expected to be covered (see House Hearings, p. 44), was not subject to the Act, and, on the other hand, that Coconino and Navajo Counties, Arizona, and Honolulu County, Hawaii, not thought to be covered (see House Hearings, pp. 42, 44), were in fact reached. See 30 Fed. Reg. 14,505.

See *Louisiana* v. *United States*, 380 U.S. 145, and the discussion at pp. 45–51, *supra*. Nor can there be objection to confining the litigation to the United States District Court for the District of Columbia. Trial in a three judge federal court at the Nation's capital provides a convenient forum and ensures a prompt and impartial determination relieved of local pressures on either hand. There is ample power to confine specialized litigation to a single tribunal. *Lockerty* v. *Phillips*, 319 U.S. 182; *Yakus* v. *United States*, 321 U.S. 414, 427–431; *Bowles* v. *Willingham*, 321 U.S. 503.

The statutory departures from the familiar form of proceeding in equity to enjoin alleged violations of voting rights work no harm to any legitimate State interest and were essential to swifter and more effective enforcement of Fifteenth Amendment rights. The record of delay, frustration and continued violation so long as enforcement required county-by-county evidence (pp. 70–73, *supra*) demonstrated the necessity of proceeding in larger units at least when Statewide figures showed less than half the adult population to have participated in the most recent Presidential election under a Statewide test or device readily susceptible of discriminatory abuse. Section 4(d) eliminates any danger that isolated local incidents of abuse would result in Statewide disestablishment of an otherwise *bona fide* test of voting qualifications, for it provides that no State shall be deemed to have used a test or device to abridge the right to vote on account of race or color if the only incidents of such use have been few in number, have

been speedily remedied and present no reasonable probability of recurrence. Guided by this provision the courts can be expected to apply the test with a practical appreciation of the fundamental aim of barring the use of tests or devices where they present substantial danger of the violations to which they have been so easily and often adapted while permitting their continuance where past performance shows that the test or device has operated even-handedly as a true measure of voter qualifications.[50]

The Congressional decision to shift the burden of proof to the State in a proceeding under Section 4 rests upon three considerations which furnish ample constitutional justification.

First, the very fact that less than half the State's population has participated in a Presidential election under a kind of test or device for determining voting

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[50] Before Section 4(d) was added the Attorney General had testified (Senate Hearings 53):

"I think you make a good point, that the committee might wish to consider, that if the difficulty is that there is one instance of one person being denied a vote 10 years, the judge could come—the court could come under this, could read this section in such a way as to say that if that were proved, the literacy test within section 3(a), I think the committee could consider whether or not the meaning of this, or what it ought to be, might not be to show more than one isolated instance.

I wouldn't have any objection to showing more than one isolated instance. I would have objection to making that test one of shifting all of the proof again and all of the thousands of man-hours I think we go into to make a showing similar to what we now have to show in every voting county. If there was—if you wanted to exempt the one or two or three isolated instances of one person and to make the evidence have to establish that it was not an isolated instance with respect to one person, I would have no objection.

qualifications which has often been used as a subterfuge for violating the Fifteenth Amendment indicates a substantial probability that the test is being so used (see pp. 55–69, *supra*). Since Congress can act to meet threats to constitutional rights without requiring proof that they are more likely than not to eventuate in actual injury, it is not irrational to suppress the danger, on the basis of such an inference, unless the opposing party produces contrary evidence, irrespective of whether that procedure would be adequate in a criminal presecution. Even in criminal cases a presumption may be created on the basis of a rational connection between the facts to be demonstrated and the facts actually proved (*United States* v. *Gainey*, 380 U.S. 63, 65–67), and even without a formal presumption, conviction may be warranted if the defendant fails to rebut an inference rationally to be drawn from the demonstrated facts (*Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Luria* v. *United States*, 231 U.S. 9, 25–26). Here, there are no problems of self-incrimination or interference with the functions of a criminal jury.

Second, putting the burden of proof upon the State is warranted by the fact that the State can produce the evidence showing the actual administration of any test or device much more easily than the Attorney General. In civil proceedings this is an accepted basis for the establishment of a presumption. 9 Wigmore, *Evidence* 3d ed. 1940) § 2486; Morgan, *Some Problems of Proof* (1956) 76. Here the State officials know and can readily testify concerning the manner

in which they administer the tests. They have custody of or access to the records. As the Attorney General explained during the congressional hearings, in most instances little more would be required to put upon him the burden of producing evidence of actual use of the test or device to abridge the right to vote on account of race or color. Senate Hearings 26–27. Bearing in mind the balance of convenience, the initial burden put upon the State is scarcely onerous.

Third, Congress could constitutionally provide that any uncertainty remaining at the end of the Section 4(a) litigation concerning the actual use of a test or device should be resolved by disestablishment of the test for the full period necessary to remedy and prevent revival of any abuse. As we have repeatedly pointed out, the power to enforce the constitutional prohibition against discriminatory denial of voting rights includes authority to obviate substantial risks of violation as well as to remedy actual infractions. See pp. 53–55, *supra*. Such a substantial danger exists whenever the evidence adduced at a thorough judicial inquiry leaves uncertainty as to whether a test or device of a kind frequently used to violate the Fifteenth Amendment has actually been used for that purpose in a particular jurisdiction or operates only as a bona fide, non-discriminatory test of voting qualifications.

In effect, therefore, the suit authorized by Section 4(a) operates substantially as an application for an exemption. There is ample constitutional justification for putting upon those seeking the benefit of

exemptions both the burden of seeking such exemption in court and the onus of establishing their entitlement. *E.g.*, Emergency Price Control Act of 1942, Section 203(a), 56 Stat. 23; Civil Rights Act of 1964, Section 709(e), 78 Stat. 241, 263, 42 U.S.C. 2000e-8(e); Interstate Commerce Act, Section 204 (a)(4a), as amended, 49 U.S.C. 304(a)(4a); Securities and Exchange Commission Rule 10 B–8(f), promulgated pursuant to Securities Exchange Act of 1934, 15 U.S.C. 78j(b). See also *Securities & Exchange Commission* v. *Ralston Purina*, 346 U.S. 119.

In the final analysis, the operation of the triggers, the temporary automatic suspension of inherently dangerous tests and devices, and the provision for more detailed judicial inquiry into their actual operation at the request of any State or political subdivision affected, must be viewed as a single integrated measure for quickly halting the widespread use of such tests and devices as instruments for denying or abridging the right to vote on account of race or color in violation of the Fifteenth Amendment. Viewed as a unit, the provisions of Section 4 are plainly adapted to the end of immediate enforcement—a constitutionally permissible objective under Amendment XV, Section 2. They suspend the use of tests without further inquiry only in those instances where the kind of guides immediately available show the greatest danger of discriminatory use; and that suspension operates, if the State or subdivision wishes it lifted, only during the interim period necessary for judicial investigation and a more refined determination of the actual danger of

abuse. Thereafter, the judicial decision replaces the triggering findings as the determinant, and any State is free to resume the use of a test or device which is found to have been used only as a bona fide test of voter qualifications. We submit, therefore, that the Act establishes a fair and reasonable procedure for determining when and whether a literacy test or similar device should be outlawed in a particular State or county as an engine of discrimination or permitted as a legitimate exercise of the power to fix voting qualifications.

III

THE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965 RELATING TO THE REVIEW OF NEW VOTING STANDARDS AND PROCEDURES AND THE APPOINTMENT OF FEDERAL EXAMINERS ARE A PROPER EXERCISE OF CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT

The second conclusion which Congress reached on the basis of the evidence before it was that, where the enforcement of tests and devices had been suspended, it might also be necessary to prevent attempts at evasion and circumvention by State or local officials. To that end, two related provisions were included in the Voting Rights Act, applicable to otherwise covered States and subdivisions: First, a prohibition against putting into effect new voting qualifications and procedures until they had been screened administratively or judicially and found harmless (Section 5); and, second, an authorization for the appointment of federal examiners to qualify voting applicants when the Attorney General deemed their use necessary to en-

force the guarantees of the Fifteenth Amendment (Section 6). The appropriateness of these procedures in light of the realities requires little discussion.

The frequency with which the adoption of new devices has been resorted to in the past to frustrate or delay the enjoyment of the franchise by the Negro warranted anticipating and forestalling it in the future. We have already alluded to the long history of changing qualifications designed to defeat Negro suffrage (*supra,* pp. 62–63, n. 41). This Court is familiar with the remarkably persistent record of varied schemes devised for that purpose—from the crudest to the most ingenious. Only last Term, the Court had occasion to notice that pattern in Louisiana and Mississippi. See *Louisiana* v. *United States,* 380 U.S. 145, 147–151; *United States* v. *Mississippi,* 380 U.S. 128, 132–136. See, also, the government's briefs in those cases, Nos. 67 and 73, October Term, 1964. Alabama's recent history is comparable. See *United States* v. *Penton,* 212 F. Supp. 193 (M.D. Ala.); *United States* v. *Parker,* 236 F. Supp. 511 (M.D. Ala). Against that background, Congress was fully warranted in guarding against novel methods of voter discrimination. And, since it was impossible to foresee every possible avenue of evasion that might be taken, it was appropriate to require review of all changes of practice or procedure in this sensitive area.

Much the same reasons justify the provision for the appointment of federal examiners in areas where discriminatory practices by local registrars were prevalent and continuing. It is in essential respects like the voting referee provision of the Civil Rights Act of 1960 (42 U.S.C. 1971(e), which has been sustained

against constitutional challenge. See *United States* v. *Manning,* 206 F. Supp. 623, 215 F. Supp. 272 (E.D. La.); *United States* v. *Mayton,* 335 F. 2d 153 (C.A. 5); *United States* v. *Scarborough,* 348 F. 2d 168 (C.A. 5). The same considerations govern here. The litigated cases—all made known to the Congress—establish that racial barriers to registration may be perpetuated by the conduct of individual registrars as well as by more formal standards and procedures inscribed in the statute books. Nor was Congress lacking evidence that some local election officials adhere to their discriminatory practices in defiance of federal authority. *E.g., United States* v. *Lynd,* 301 F. 2d 818 (C.A. 5); *id.,* 321 F. 2d 26; *United States* v. *Louisiana, In re Mary Ethel Fox* (E.D. La., C.A. 2548), affirmed *sub nom. Fox* v. *United States,* 381 U.S. 436; *United States* v. *Cox* (N.D. Miss., C.A. No. 53–61). Moreover, it was reasonable to assume that, in some instances at least, the hostility of the local registrar to Negro suffrage was so notorious that eligible Negroes would be too intimidated to approach him, being reasonably doubtful that his policy had changed. In those circumstances, a neutral examiner is essential to carry out the purpose of the Fifteenth Amendment to allow the exercise of the franchise uninhibited by considerations of race.[51]

CONCLUSION

The case before the Court has roots which go deep. The Voting Rights Act of 1965 corrects the failure of the Nation—an agonizing and damaging failure—to do justice to all of its people and to bring a large class

[51] See, U.S. Commission on Civil Rights, *Voting in Mississippi* (1965), pp. 21–24, 62, and *The Voting Rights Act—The First Months* (1965), p. 21.

of its citizens into the mainstream of American life. The failure has endured for generations, and the twisted branches which have sprung from wrongs long unrectified are deeply entwined in our political life. These considerations do not stand apart from the principles of constitutional adjudication. In the responsible exercise of its express powers, Congress was bound ultimately to face the grave and harsh necessities and to fashion an instrument of redress which cut to the root and branch. So, also, we submit the courts may not blind themselves to what the Nation knows.

This Court should enter judgment for the defendant sustaining the constitutionality of the Voting Rights Act of 1965 and dismissing plaintiff's suit.

Respectfully submitted.

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APPENDIX

Constitutional and Statutory Provisions Involved

The relevant provisions of the United States Constitution are as follows:

Article 1, Section 2, Clause 1:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article 1. Section 4, Clause 1:

> The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

Fifteenth Amendment:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Seventeenth Amendment, Clause 1:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

The federal statute involved is the Voting Rights Act of 1965 which is as follows:

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965".

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided,* That the court need not authorize the appointment of examiners if any incidents of denial or abridgment of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been

eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided,* That such qualification, prerequisite, standard practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such sub-

mission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a) To assure that the right of citizens of the United Sates to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declartory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after

judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for

the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard,

practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard practime, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b) unless a declatory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or

more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9 (a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: *Provided*, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil

Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided,* That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

SEC. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for

the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled

or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district court of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, shall declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to

vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document

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knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 shall violate section 11 (a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11 (a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant

to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an

examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a

ballot, and having such ballot counted properly and included in the appropriate totals of votes with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might

tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

The relevant provisions of the South Carolina Constitution (1895) are the following sections of Article 2, as amended:

§ 3. *Electors.*—Every male citizen of this State and of the United States twenty one years of age and upwards, not labouring under the disabilities named in this Constitution and possessing the qualifications required by it, shall be an elector.

§ 4. *Qualifications for suffrage.*—The qualifications for suffrage shall be as follows:

(a) *Residence.*—Residence in the State for one year, in the county for six months, and in the polling precinct in which the elector offers to vote for three months; *provided,* that ministers in charge of an organized church and teachers of public schools and the spouse of any

such person shall be entitled to vote after six months' residence in the State, otherwise qualified. [1964 Cum. Supp.]

(b) *Registration.*—Registration, which shall provide for the enrollment of every elector once in ten years, and also an enrollment during each and every year of every elector not previously registered under the provisions of this Article.

(c) *Qualification for registration up to January, 1898; list of registered voters.*—Up to January 1st, 1898, all male persons of voting age applying for registration who can read any section in this Constitution submitted to them by the registration officer, or understand and explain it when read to them by the registration officer, shall be entitled to register and become electors. A separate record of all persons registered before January 1st, 1898, sworn to by the registration officer, shall be filed, one copy with the Clerk of Court and one in the office of the Secretary of State, on or before February 1st, 1898, and such persons shall remain during life qualified electors unless disqualified by the other provisions of this Article. The certificate of the Clerk of Court or Secretary of State shall be sufficient evidence to establish the right of Said Citizens to any subsequent registration and the franchise under the limitations herein imposed.

(d) *Qualification for registration after January 1st, 1898.*—Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: *Provided,* That he can both read and write any Section of this Constitution submitted to him by the registration officer, or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars ($300) or more.

(e) *Payment of taxes necessary for voting.*—Eliminated by 1949 (46) 773; 1951 (47) 24.

(f) *Certificate of registration.*—The General Assembly shall provide for issuing to each duly registered elector a certificate of registration and shall provide for the renewal of such certificate when lost, mutilated or destroyed, if the applicant is still a qualified elector under the provisions of this Constitution, or if he has been registered as provided in subsection (e).

§ 5. *Appeal; crimes against election laws.*—Any person denied registration shall have the right to appeal to the Court of Common Pleas, or any Judge thereof, and thence to the Supreme Court, to determine his right to vote under the limitations imposed in this Article, and on such appeal the hearing shall be *de novo*, and the General Assembly shall provide by law for such appeal, and for the correction of illegal and fraudulent registration, voting, and all other crimes against the election laws.

§ 6. *Persons disqualified from voting.*—The following persons are disqualified from being registered or voting:

First, Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or crimes against the election laws: *Provided*, That the pardon of the Governor shall remove such disqualification.

Second, Persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison.

The relevant provisions of the South Carolina Code are as follows:

§ 23-62. [1964 Cum. Supp.] *Qualifications for registration; persons disqualified.*—Every citizen of this State and the United States who:

(1) Is twenty-one years of age or more;

(2) Is not laboring under disabilities named in the Constitution of 1895 of this State;

(3) Shall have been a resident in the State for one year, in the county for six months and in the polling precinct in which the elector offers to vote for three months before any election;

(4) Can both read and write any section of said Constitution submitted to said elector by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more; and

(5) Shall apply for registration;

Shall be registered; *provided, however,* that:

(a) Ministers in charge of an organized church and teachers of public schools and the spouses of any such persons shall be entitled to register and vote after six months' residence in the State if otherwise qualified;

(b) Persons who are mentally incompetent, paupers supported at the public expense and persons confined in any public prison shall be disqualified from being registered or voting; and

(c) Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny or crimes against the election laws shall be disqualified from being registered or voting, unless such disqualification shall have been removed by the pardon of the Governor.

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IN THE

Supreme Court of the United States

October Term 1965
No. 22, Original

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

NICHOLAS deB. KATZENBACH, Attorney General of the United States,

Defendant.

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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IN THE

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STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States,

Defendant.

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

Interest of Amicus Curiae.

California is submitting a brief *amicus curiae* in support of the United States Attorney General because it is imperative that all legitimate means be adopted to enhance the right of universal suffrage. For as President Johnson stated when he urged passage of the Voting Rights Bill:

> "In our system, the first right and most vital of all our rights is the right to vote . . . It is from the exercise of this right that the guarantee of all our other rights flow.
>
> Unless the right to vote be secure and undenied, all other rights are insecure and subject to denial for all our citizens. The challenge to this right is a challenge to America itself."[1]

[1]President Lyndon B. Johnson's message to Congress, March 15, 1965; 111 Cong. Rec. 4927 (daily ed. Mar. 15, 1965).

It is a truism that California, as a state of the Union, has a vital interest in assuring that the voice which speaks for America is truly representative of all its people, a representation which cannot be achieved if there is unjustifiable restriction of suffrage.

But more particularly, California, as a sovereign state, is concerned with the voting rights of its own residents. She seeks assurance that no state erect or maintain barriers which unfairly abridge the right to vote, for such barriers leave individuals new to California inexperienced and apathetic in their political participation, the most important aspect of which is the exercise of the vote. Equally, California is anxious that none of her citizens lose political rights when they emigrate, for surely no man should be subjected to the possibility of a stripping of constitutional guarantees simply because circumstances lead him to live elsewhere.[2]

---

[2]California cannot limit her concern over suffrage to those Americans who presently live within her borders. The precepts of the Constitution and the practical necessities of life do not permit such a restricted attitude.

Every day brings new citizens to California from other sections of the nation. For the 5-year period from 1955 to 1960, 2,148,255 residents of other parts of the Union moved to this state. (U.S. Bureau of Census P.C. (2)-2B). During the year ending July 1, 1965, California's population showed an approximate net increase of 340,000 attributable solely to migration from within the United States. (Information supplied to our office by the Office of Population Studies, California Department of Finance).

President Kennedy expressed the necessity of such a national concern in another context when he spoke at San Diego State College on June 6, 1963. Given the fundamental importance of the right to vote, his words have equal meaning here. ". . . American children today do not yet enjoy equal educational opportunities for two primary reasons: One is economic and the other is racial. . . . It does no good, as you in California know better than any, to say that that is the business of another state. It is the business of our country. These young, uneducated boys and girls know no state boundaries and they come West as well as North and East.

As one of the 21 states with literacy[3] or other voting qualification tests,[4] California is concerned that there be no impropriety in the administration of these tests, so that no disparaging reflection be cast upon their use. Congress, however, after extensive hearings, has found that voting tests are being used to disenfranchise certain racial groups and economic classes. Its findings suggest that a fundamental principle of our nation is being ignored, a principle which James Madison enunciated so well when he discussed the qualifications of voters in *The Federalist*. As electors, he said, the Union should have,

> "Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."[5]

They are your citizens as well as citizens of this country." *The Burden and the Glory: The Hopes and Purposes of President Kennedy's Second and Third Years in Office as Revealed in his Public Statements and Addresses.* (New York: Harper & Row, (1964), page 260.)

Conversely, 938,455 Californians between 1955 and 1960 emigrated to other regions of the nation, oft-times attributable to the exigencies of California business and commercial interests. It cannot be denied that discrimination elsewhere based upon race or color bears upon the mobility of California citizens who participate in California-based industry with interests in other parts of the country.

[3]California Constitution, article II, section 1.

[4][Hearings on S. 1564 Before the Committee on the Judiciary, 89th Cong., 1st Sess., pt. 2, at 1462-1463].

[5]*The Federalist* No. 57, p. 371 (Modern Library Ed.).

When Madison contributed to *The Federalist*, he was concerned solely with the adoption of the Constitution, and thus his words were directed toward federal elections. But his views are pertinent and significant today, for since his writing the right of suffrage has been continually expanded, through amendments such as the fifteenth and seventeenth. And those amendments speak in terms of state as well as federal elections.

The Voting Rights Act represents the conclusion of Congress that this principle must be re-affirmed and that no state frustrate it with sophisticated techniques. California submits that there was ample evidence before Congress to warrant this re-affirmation and to preclude its frustration. California therefore supports the legislation.

In California, Madison's beliefs are reflected in article II, section 1 of the state constitution which proclaims:

> "Every native citizen of the United States of America, every person who shall have acquired the rights of citizenship under and by virtue of the Treaty of Queretaro, and every naturalized citizen thereof, who shall have become such 90 days prior to any election, of the age of 21 years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law; . . ."

For the past 75 years the thrust of California law at all levels, from popular referendums to judicial decisions, has been directed toward the advancement of universal suffrage.[6]

Nevertheless, California believes her efforts may often be insufficient, for she cannot protect her citizens

[6]For example, California voters voluntarily removed a restriction against "Natives of China" through a constitutional amendment in 1926. Her legislature has continually sought to implement equal suffrage through amendments to the California Election Code. Most recently, it passed Election Code section 223, which states that "no county clerk may refuse to deputize any person to register to vote because of race, creed, color, or national origin or ancestry." Previous sections included section 201, where encouragement of registration is declared as the express intent of the legislature, and where "co-operation of interested citizens and organizations" is solicited; and sections

once they leave the state. And while California can offer to all the opportunity to vote, she cannot easily instill a desire to exercise this right here in people made apathetic by unconstitutional disenfranchisement elsewhere. Apathy and non-participation, however, are not the only results of disenfranchisement which concern California, for the denial of the right to vote may also produce mistrust and suspicion of elected officials. The disenfranchised may come to believe their representatives are oblivious to their needs and unaware of their interests, attitudes which have no place in America.[7]

In preparing this brief, California attempted to gauge the extent of this apathy by studying the 1960 voting behavior of Negro migrants from the South.[8] Five areas of Los Angeles County were chosen from the 14 areas with the highest concentration of Negroes according to the 1960 census data. Three of these areas

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29000 ff, where penal provisions are directed against individuals or groups who threaten or intimidate prospective voters. California courts have long echoed this philosophy (see, for example, *Spier v. Baker*, 120 Cal. 370, 375 (1898); *People v. Elkus*, 59 Cal. App. 396, 398 (1922)), and defeated what few attempts have been made to limit suffrage. See, for example, *Regan v. King*, 49 F. Supp. 223 (1942), where an endeavor to disenfranchise people of Japanese origin was prevented. It should be noted that *Regan* was an action where the defendant-registrar was attacked not because he refused to register Japanese-Americans, but because he refused to remove those already on the rolls.

[7]Testimony to this effect was presented to Congress during its deliberations on the Voting Rights Bill. See, for example, the statements of Mrs. Victoria J. Gray, on behalf of the Mississippi Freedom Democratic Party [Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., Ser. 14 at p. 522] and those of Mrs. Virginia Y. Collins, Chairman, Ad Hoc Committee of Concerned Citizens of New Orleans [*id.* at p. 533].

[8]This group was chosen for primary study because the congressional hearings revealed they were the people most often affected by improper voting test administration.

had the highest percentage of new residents from the South. The remaining two reflected the exact opposite —the highest percentage of migration from the West, North and East. By analyzing the two, it was possible to determine how areas with high Southern migration compared with areas with high non-Southern migration.

The results, which are detailed in Appendix A, are of more than passing interest. For in the "High Southern Migration" area, not only did fewer of the eligible population register to vote, but fewer of those registered actually voted, and thus the area participated less in the 1960 presidential election. The table also reveals that the "High Southern Migration" area manifests less participation than either Los Angeles County or the state as a whole.

Perhaps, with time, apathy and mistrust can be overcome. But the surest means of overcoming both apathy and disillusionment is to prevent their occurrence by insuring that the mandate of the fifteenth amendment be effectively enforced.

Through the enactment of the Voting Rights Act of 1965, Congress is seeking to meet this mandate and finally end an evil, which after 100 years of patience, our Union can no longer tolerate. The law is well within the constitutional power of Congress and its appropriateness is beyond question.

ARGUMENT.

I.

Congress Has the Power Under the Constitution to Enact the Voting Rights Act of 1965.

There is no doubt that the Constitution gives Congress the power to enact the Voting Rights Act of 1965. (Public Law 89-110.) The fifteenth amendment provides:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Additionally, article I, section 4, grants Congress the power to make or alter any state regulations as to the time, place and manner of holding elections for senators and representatives, "except as to the places of choosing senators."

It has long been held that when Congress has been granted such specific and plenary power as that granted by the fifteenth amendment and article I, section 4, its power to enact legislation pursuant to such a grant is very broad and unfettered. As Justice Marshall succinctly stated in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819):

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constituiton, are constitutional."

More recently, this was reiterated in *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 258 (1964), where it was said in reference to the commerce clause and the Civil Rights Act of 1964:

> "The Commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."

Past cases upholding legislation under the fifteenth amendment reveal the breadth of congressional power under that amendment. For example, in *United States v. Mississippi*, 380 U.S. 128, 141 (1965), this Court upheld the power of Congress to make a state a defendant in a suit seeking preventive relief from voting discrimination. In *Hannah v. Larche*, 363 U.S. 420, 452 (1960), the 1957 Civil Rights Act was held to be appropriate legislation under the fifteenth amendment. Also in *United States v. Raines*, 362 U.S. 17, 25 (1960), the 1957 Civil Rights Act, including provisions giving the Attorney General power to bring suits for preventive relief, was held constitutional.

It has been contended that the total effect of sections two and four of article I, the first section of article II, and the seventeenth amendment, is to vest in each state the exclusive power to decide the qualifications for its electors for representatives, senators, president and vice president. See Hearings on S. 1564 Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1 at pp. 664-666 (1965).

The words of the late Justice Frankfurter in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), provide a reply to such a contention.

> "When a Senate exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

The fifteenth amendment makes the right to be free from the abridgment of voting rights on account of race or color a federally protected right. In a continuous line of cases since 1880 this Court has held that the right of a state to fix the qualifications of her electors is qualified and restricted by the fifteenth amendment. In addition to *Gomillion v. Lightfoot, supra*, see *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Louisiana v. United States*, 380 U.S. 145, 153 (1965); *United States v. Mississippi, supra*, at page 138 (1965); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50, 53 (1959) (dictum); *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Guinn v. United States*, 238 U.S. 347, 362 (1915); *Pope v. Williams*, 193 U.S. 621, 633 (1903); *Neal v. Delaware*, 103 U.S. 370, 389 (1880).

The language found in *Guinn v. United States, supra*, at page 362 is especially appropriate to illustrate the point.

> "But it is equally beyond the possibility of question that the [fifteenth] Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude."

There is no doubt that a state may prescribe that a person be literate as a pre-condition to his right to vote. See *Lassiter v. Northampton Election Bd., supra,* at 50-51. However, the act in question does not seek to abolish literacy tests *per se,* but only those literacy tests which are used for the purpose or with the effect of denying or abridging the right to vote on account of race or color. Congress was faced with the following considerations. On the one hand there was extensive evidence pointing to an unquestioned abuse of literacy tests leading to an unjustified restriction of the suffrage. On the other hand, any means used to correct the situation created the possibility of some persons being permitted to vote who might not meet the requirement of a bona fide literacy test. The solution need not be perfect, and bearing in mind the ineffectiveness of past Congressional attempts and the heavy preponderance of evidence that the conditions still persisted, Congress had no choice but to enact the Voting Rights Act of 1965. What better way to attack the evil than by suspending the instrument of the evil! Congress has not exceeded the power given to it under the fifteenth amendment because the incidental effect of the suspension of a particular literacy test may result in allowing some who are actually illiterate to vote. *Cf. Guinn v. United States, supra* at 362, 363; *Neal v. Delaware, supra* at 389.

II.

The Voting Rights Act of 1965 Is Appropriate Legislation Under the Fifteenth Amendment and Is Not a Bill of Attainder, Ex Post Facto Law, nor a Violation of Due Process.

(a) The Voting Rights Act of 1965 Is Manifestly Appropriate Legislation Under the Fifteenth Amendment.

In deciding on the appropriateness of past legislation, this Court has repeatedly stated that it would not inquire into the necessity or wisdom of the enactment.

> "It is . . . well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. [citations omitted.] Nor may it enquire as to the wisdom of the legislation." *Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924). See *e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 492 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952).

Similarly, this Court has held that if there is any rational basis for Congress to find that the regulatory plan it chooses is necessary to enforce the fifteenth amendment, then the investigation into the appropriateness of that plan is at an end. See *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1965); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

An examination of the records of the hearings before both the Senate and House Committees reveals ample evidence to give Congress a rational basis to conclude that the particular plan it enacted was necessary. For example, testimony indicated that in a great

majority of cases low voter participation is related to racial discrimination. (See Hearings Before Subcommittee number 5 of the House Committee on the Judiciary 89th Cong., 1st sess., ser. 14 at p. 24 (1965).) Furthermore, there was evidence that in states and counties where less than 50 per cent of those residents of voting age were registered or voted, the percentage of Negroes who were registered was extremely low. (See House Hearings, *supra*, at p. 26; Hearings on S. 1564. Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1 at p. 33 (1965).) In general, these are the areas where complaints about discrimination have been made (See House Hearings, *supra*, at 27) and where the Department of Justice has filed and won voting discrimination suits under previous law. (See House Hearings, *supra*, at 27; Senate Hearings, *supra*, at p. 33). Statistics presented to Congress bear this out. (See House Hearings, *supra*, at pp. 29-33.)

The act creates a presumption that any state or political subdivision thereof which uses some form of voting test or device and wherein less than 50% of those residents of voting age were either registered on November 1, 1964, or voted in the 1964 presidential election, is using that voting test or device to deny or abridge voting rights on account of race or color. (See sections 4(a) and 4(b) of the Voting Rights Act of 1965.) In the light of the evidence before Congress, the rationality of this presumption is amply supported.

(b) Sections 4(a) and 4(b) Are Not a Bill of Attainder, nor Ex Post Facto Law, nor Do They Violate Due Process.

The multiplicity of contentions concerning bills of attainder, *ex post facto* laws, and violations of due process only serve to confuse the issues before the Court.

The contentions invoking these doctrines are but variants of one basic argument—that the Voting Rights Act of 1965 is invalid because it works a punishment or deprivation upon certain citizens.

The cases condemning a statute as a bill of attainder all involve situations where an individual or group was being punished or deprived of a valuable right. See *United States v. Brown,* 381 U.S. 437 (1965) (denial of the right to be an officer or employee of a labor union); *United States v. Lovett,* 328 U.S. 303 (1946) (withholding an individual's salary); *Ex parte Garland,* 71 U.S. (4 Wall.) 333 (1866) (denial of right to engage in the practice of a profession); *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1866) (same).

The same requirement is applicable to an *ex post facto* law. See *Flemming v. Nestor,* 363 U.S. 603, 613 (1960). Furthermore, the due process clause of the fifth amendment requires a deprivation "of life, liberty, or property."

The Voting Rights Act of 1965 does not punish or deprive anyone of any rights. No person or group loses life, liberty, property, or job because a voting test is suspended. A particular state or county cannot be heard to complain because it has lost the right to discriminate on account of race or color. It never had such a right. Nor can they argue that the operation of the presumption works a punishment in the form of a dilution of some of their citizens' vote. Every exercise of power under the fifteenth amendment must have an impact on those who have enjoyed the benefit of an unjustifiably restricted suffrage. "Dilution" in this sense is not a deprivation. To consider it so is to limit Congress to previously used methods of enforcing the fifteenth amendment, which experience has

demonstrated are ineffective. Consequently, to impose such a limitation on congressional power would render the fifteenth amendment nugatory.

Nor can it be argued that the Voting Rights Act of 1965 is a bill of attainder on any theory that it allegedly violates the principle of separation of powers. It is a proper legislative function to formulate policy through the expression of rules, and to state what set of circumstances amount to a violation of those rules. It is equally proper for the legislature to decide the consequences of a violation. In enacting the Voting Rights Act, Congress has merely decided what set of circumstances amount to a violation of the commands of the fifteenth amendment, and that suspension of a voting test or device is one of the consequences of such a violation. It is true that the Director of the Census and the Attorney General, both members of the executive branch, make the simple ministerial determination as to the existence of those circumstances which amount to a violation. (See Sec. 4(b).) Even greater delegations of Congressional power have long been held valid. See *Bowles v. Willingham*, 321 U.S. 503, 515 (1944); *Yakus v. United States*, 321 U.S. 414, 424 (1944). It is not true that Congress has attempted to usurp judicial power. Congress has scrupulously preserved separation of powers. This follows since section 4(a) provides a mechanism by which the courts decide the ultimate issue of whether a test or device is being used in a discriminatory manner. It is this legislative recognition of judicial control which distinguishes the situation here from that which troubled this Court in *United States v. Brown, supra*. No state need be finally subjected to the consequences of the Voting Rights Act of 1965 without this judicial determination.

Conclusion.

The fifteenth amendment affirmatively grants Congress the power to enact the Voting Rights Act of 1965. Furthermore, the act is appropriate legislation and is not a bill of attainder, nor an *ex post facto* law, nor a violation of due process. For these reasons, the State of California submits that the Voting Rights Act of 1965 of 1965 is constitutional. Therefore, the State of California prays that a decree be entered adjudging the Voting Rights Act constitutional, and that the request for an injunction preventing the Attorney General from enforcing it be denied.

Dated: January 5, 1966.

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APPENDIX A.[1]

	High Southern Migration Area	High-Non-Southern Migration Area	Los Angeles County	California
Total Population	206,235	129,232	6,038,771	15,717,204
% migrants from South	61.6	25.3	*	26.3
% migrants from outside South	38.4	74.7	*	73.7
Total Population Eligible[2] to Vote, 1960	112,699	79,328	3,830,926	9,660,178
% of Eligible[2] who registered	69.2	73.0	78.6	77.2
% of Registered who voted	81.7	87.3	87.4	87.1
% of eligible[2] who voted	56.1	63.8	68.7	67.3

*No available statistics.

[1]The material used in this table was prepared in the following manner. First, through information supplied by Edward Freudenberg and Lloyd Street's *Social Profile: Los Angeles County;* a determination was made of which areas in Los Angeles County reflected the highest and lowest rate of Negro migration from the South. Only those areas with a 20% or higher Negro population were considered. "Migration" was based upon the number of people who moved to Los Angeles during the five-year period from 1955-1960.

Since these study areas were based upon census tracts, it was felt that an adequate comparison could be made if voting statistics for the same tracts were available. This data was acquired from studies of Professor Dwaine Marvick of the University of California at Los Angeles, who correlated voting records with census tracts for the Falk Archives of Political Science. The two sets of material were then combined to produce the above table.

The data for the Los Angeles County and California columns was obtained from the United States Bureau of Census and the Los Angeles County Registrar's Office.

Because of incomplete statistics, a few census tracts in both the High Southern and High Non-Southern Migration areas had to be omitted. Also, the table reflects areas in Los Angeles County rather than the individuals within those areas.

[2]The "eligible" figure was determined by subtracting the 1960 population under 21 from the overall population in each census tract.

SUPREME COURT OF THE UNITED STATES

No. 22, ORIGINAL.

State of South Carolina, Plaintiff, *v.* Nicholas deB. Katzenbach, Attorney General of the United States.	On Bill of Complaint.

[March 7, 1966.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

By leave of the Court, 382 U. S. 898, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965 [1] violate the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General. Original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. Because no issues of fact were raised in the complaint, and because of South Carolina's desire to obtain a ruling prior to its primary elections in June 1966, we dispensed with appointment of a trial master and expedited our hearing of the case.

Recognizing that the questions presented were of urgent concern to the entire country, we invited all of the States to participate in this proceeding as friends of the Court. A majority responded by submitting or joining in briefs on the merits, some supporting South Carolina and others the Attorney General.[2] Seven of these States

[1] 79 Stat. 437.

[2] States supporting South Carolina: Alabama, Georgia, Louisiana, Mississippi, and Virginia. States supporting the Attorney General: California, Illinois, and Massachusetts, joined by Hawaii, Indiana,

also requested and received permission to argue the case orally at our hearing. Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyer-like and constructive. All viewpoints on the issues have been fully developed, and this additional assistance has been most helpful to the Court.

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the national legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

I.

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 wit-

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Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

nesses.[3] More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.[4] At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the Act by a vote of 328–74, and the measure passed the Senate by a margin of 79–18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress.[5] See H. R. Rep. No. 439, 89th Cong., 1st Sess., 8–16 (hereinafter cited as House Report); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 3–16 (hereinafter cited as Senate Report).

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[3] See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as House Hearings); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as Senate Hearings).

[4] See the Congressional Record for April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; August 3 and 4, 1965.

[5] The facts contained in these reports are confirmed, among others, by *United States* v. *Louisiana*, 225 F. Supp. 353, 363–385 (Wisdom, J.), aff'd, 380 U. S. 145; *United States* v. *Mississippi*, 229 F. Supp. 925, 983–997 (dissenting opinion of Brown, J.), rev'd and rem'd, 380 U. S. 128; *United States* v. *Alabama*, 192 F. Supp. 677 (Johnson,

The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the first Enforcement Act,[6] which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year,[7] to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894.[8] The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.[9] Typically, they made the ability to read and write

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J.), aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; Comm'n on Civil Rights, Voting in Mississippi; 1963 Comm'n on Civil Rights Rep., Voting; 1961 Comm'n on Civil Rights Rep., Voting, pt. 2; 1959 Comm'n on Civil Rights Rep., pt. 2. See generally Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan. L. Rev. 1; Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051.

[6] 16 Stat. 140.

[7] 16 Stat. 433.

[8] 28 Stat. 36.

[9] The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes. Key, Southern Politics, 537–539. Senator Ben Tillman frankly explained to the state delegates the aim of the new literacy test: "[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government." He was equally candid about the exemption from the literacy test for persons who could "understand" and "explain" a section of the state constitution: "There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps [laughter], or discriminating." He described the alternative exemp-

a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write.[10] At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn* v. *United States*, 238 U. S. 347, and *Myers* v. *Anderson*, 238 U. S. 368. Procedural hurdles were struck down in *Lane* v. *Wilson*, 307 U. S. 268. The white primary was outlawed in *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461. Improper challenges were nullified in *United States* v. *Thomas*, 362 U. S. 58. Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot*, 364 U. S. 339. Finally, discriminatory application of voting tests was condemned in *Schnell* v. *Davis*, 336 U. S. 933; *Alabama*

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tion for persons paying state property taxes in the same vein: "By means of the $300 clause you simply reach out and take in some more white men and a few more colored men." Journal of the (1895) Constitutional Convention of the State of South Carolina 464, 469, 471. Senator Tillman was the dominant political figure in the state convention, and his entire address merits examination.

[10] Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write. Following the war, these States rapidly instituted racial segregation in their public schools. Throughout the period, free public education in the South had barely begun to develop. See *Brown* v. *Board of Education*, 347 U. S. 483, 489–490, n. 4; 1959 Comm'n on Civil Rights Rep. 147–151.

v. *United States*, 371 U. S. 37; and *Louisiana* v. *United States*, 380 U. S. 145.

According to the results of recent Justice Department voting suits, the latter strategem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment.[11] Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers.[12] Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error.[13] The good morals require-

[11] For example, see three voting suits brought against the States themselves: *United States* v. *Alabama*, 192 F. Supp. 677, aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; *United States* v. *Louisiana*, 225 F. Supp. 353, aff'd, 380 U. S. 145; *United States* v. *Mississippi*, 339 F. 2d 679.

[12] A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, "FRDUM FOOF SPETGH." *United States* v. *Louisiana*, 225 F. Supp. 353, 384. A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him. *United States* v. *Penton*, 212 F. Supp. 193, 210–211.

[13] In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning "the rate of interest on the fund known as the 'Chickasaw School Fund.'" *United States* v. *Duke*, 332 F. 2d 759, 765. In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts. *United States* v. *Lynd*, 301 F. 2d 818, 821.

ment is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.[14] Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.[15]

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 [16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960 [17] permitted the joinder of States as party defendants, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 [18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting age Negroes in Alabama rose only from 10.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting age whites ran roughly 50 percentage points or more ahead of Negro registration.

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[14] For example, see *United States* v. *Atkins*, 323 F. 2d 733, 743.
[15] For example, see *United States* v. *Logue*, 344 F. 2d 290, 292.
[16] 71 Stat. 634.
[17] 74 Stat. 86.
[18] 78 Stat. 241.

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.[19] Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.[20] The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

During the hearings and debates on the Act, Selma, Alabama, was repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registra-

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[19] The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States* v. *Mississippi*, 229 F. Supp. 925, 996-997 (dissenting opinion).

[20] For example, see *United States* v. *Parker*, 236 F. Supp. 511; *United States* v. *Palmer*, 230 F. Supp. 716.

tion rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. The House Committee on the Judiciary summed up the reaction of Congress to these developments in the following words:

> "The litigation in Dallas County took more than four years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today. Such is the essential justification for the pending bill." House Report 11.

II.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.[21] The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4 (a)–(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4 (a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second

[21] For convenient reference, the entire Act is reprinted in an Appendix to this opinion.

remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6 (b), 7, 9, and 13 (a), is the assignment of federal examiners by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination. Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10 (d) excuses those made eligible to vote in sections of the country covered by § 4 (b) of the Act from paying accumulated past poll taxes for state and local elections. Section 12 (e) pr ovides for balloting by persons denied access to the polls in areas where federal examiners have been appointed.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Sections 3, 6 (a), and 13 (b) strengthen existing procedures for attacking voting discrimination by means of litigation. Section 4 (e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10 (a)–(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12 (a)–(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

At the outset, we emphasize that only some of the many portions of the Act are properly before us. South Carolina has not challenged §§ 2, 3, 4 (e), 6 (a), 8, 10, 12 (d) and (e), 13 (b), and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litiga-

tion.[22] In addition, we find that South Carolina's attack on §§ 11 and 12 (a)–(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. See *United States* v. *Raines*, 362 U. S. 17, 20–24. Consequently, the only sections of the Act to be reviewed at this time are §§ 4 (a)–(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14, all of which are presently in actual operation in South Carolina. We turn now to a detailed description of these provisions and their present status.

Coverage formula.

The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b). As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his quali-

[22] Section 4 (e) has been challenged in *Morgan* v. *Katzenbach*, 247 F. Supp. 196, prob. juris. noted, — U. S. —, and in *United States* v. *County Bd. of Elections*, 248 F. Supp. 316. Section 10 (a)–(c) is involved in *United States* v. *Texas*, — F. Supp. —, and in *United States* v. *Alabama*, — F. Supp. —; see also *Harper* v. *Virginia State Bd. of Elections*, No. 48, 1965 Term, and *Butts* v. *Harrison*, No. 655, 1965 Term, which were argued together before this Court on January 25 and 26, 1966.

fications by the voucher of registered voters or members of any class." § 4 (c).

Statutory coverage of a State or political subdivision under § 4 (b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. § 4 (a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. § 4 (d). On the other hand, no area may obtain a declaratory judgment for five years after the final decision of a federal court (other than the denial of a judgment under this section of the Act), determining that discrimination through the use of tests or devices has occurred anywhere in the State or political subdivision. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 4 (a).

South Carolina was brought within the coverage formula of the Act on August 7, 1965, pursuant to appropriate administrative determinations which have not been challenged in this proceeding.[23] On the same day, coverage was also extended to Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona.[24] Two more counties in Arizona, one county in Hawaii, and one county in Idaho were added to the list on November 19, 1965.[25]

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[23] 30 Fed. Reg. 9897.

[24] *Ibid.*

[25] 30 Fed. Reg. 14505.

Thus far Alaska, the three Arizona counties, and the single county in Idaho have asked the District Court for the District of Columbia to grant a declaratory judgment terminating statutory coverage.[26]

Suspension of tests.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a "test or device." § 4 (a).

On account of this provision, South Carolina is temporarily barred from enforcing the portion of its voting laws which requires every applicant for registration to show that he:

> "Can both read and write any section of [the State] Constitution submitted to [him] by the registration officer or can show that he owns, and has paid all taxes collectable during the previous year on, property in this State assessed at three hundred dollars or more." 23 S. C. Code 62 (4) (1965 Supp.).

The Attorney General has determined that the property qualification is inseparable from the literacy test,[27] and South Carolina makes no objection to this finding. Similar tests and devices have been temporarily suspended in the other sections of the country listed above.[28]

Review of new rules.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a voting qualification or procedure different from those in force on

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[26] *Alaska* v. *United States*, Civ. Act. 101–66; *Apache County* v. *United States*, Civ. Act. 292–66; *Elmore County* v. *United States*, Civ. Act. 320–66.

[27] 30 Fed. Reg. 14045–14046.

[28] For a chart of the tests and devices in effect at the time the Act was under consideration, see House Hearings 30–32; Senate Report 42–43.

November 1, 1964. This suspension of new rules is terminated, however, under either of the following circumstances: (1) if the area has submitted the rules to the Attorney General, and he has not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise on racial grounds. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 5.

South Carolina altered its voting laws in 1965 to extend the closing hour at polling places from 6 p. m. to 7 p. m.[29] The State has not sought judicial review of this change in the District Court for the District of Columbia, nor has it submitted the new rule to the Attorney General for his scrutiny, although at our hearing the Attorney General announced that he does not challenge the amendment. There are indications in the record that other sections of the country listed above have also altered their voting laws since November 1, 1964.[30]

Federal examiners.

In any political subdivision covered by § 4 (b) of the Act, the Civil Service Commission shall appoint voting examiners whenever the Attorney General certifies either of the following facts: (1) that he has received meritorious written complaints from at least 20 residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners is otherwise necessary to effectuate the guarantees of the Fifteenth Amendment. In making the latter determination, the Attorney General must consider, among other factors, whether the registration ratio of non-whites to whites seems reasonably attributable to

[29] 1965 S. C. Stat. (54) 466.

[30] Brief for Mississippi as *amicus curiae*, App.

racial discrimination, or whether there is substantial evidence of good-faith efforts to comply with the Fifteenth Amendment. § 6 (b). These certifications are not reviewable in any court and are effective upon publication in the Federal Register. § 4 (b).

The examiners who have been appointed are to test the voting qualifications of applicants according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms. §§ 7 (a) and 9 (b). Any person who meets the voting requirements of state law, insofar as these have not been suspended by the Act, must promptly be placed on a list of eligible voters. Examiners are to transmit their lists at least once a month to the appropriate state or local officials, who in turn are required to place the listed names on the official voting rolls. Any person listed by an examiner is entitled to vote in all elections held more than 45 days after his name has been transmitted. § 7 (b).

A person shall be removed from the voting list by an examiner if he has lost his eligibility under valid state law, or if he has been successfully challenged through the procedure prescribed in § 9 (a) of the Act. § 7 (d). The challenge must be filed at the office within the State designated by the Civil Service Commission; must be submitted within 10 days after the listing is made available for public inspection; must be supported by the affidavits of at least two people having personal knowledge of the relevant facts; and must be served on the person challenged by mail or at his residence. A hearing officer appointed by the Civil Service Commission shall hear the challenge and render a decision within 15 days after the challenge is filed. A petition for review of the hearing officer's decision must be submitted within an additional 15 days after service of the decision on the person seeking review. The court of appeals for the circuit in which the person challenged resides is to

hear the petition and affirm the hearing officer's decision unless it is clearly erroneous. Any person listed by an examiner is entitled to vote pending a final decision of the hearing officer or the court. § 9 (a).

The listing procedures in a political subdivision are terminated under either of the following circumstances: (1) if the Attorney General informs the Civil Service Commission that all persons listed by examiners have been placed on the official voting rolls, and that there is no longer reasonable cause to fear abridgment of the franchise on racial grounds, or (2) if the political subdivision has obtained a declaratory judgment from the District Court for the District of Columbia, ascertaining the same facts which govern termination by the Attorney General, and the Director of the Census has determined that more than 50% of the non-white residents of voting age are registered to vote. A political subdivision may petition the Attorney General to terminate listing procedures or to authorize the necessary census, and the District Court itself shall request the census if the Attorney General's refusal to do so is arbitrary or unreasonable. § 13 (a). The determinations by the Director of the Census are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b).

On October 30, 1965, the Attorney General certified the need for federal examiners in two South Carolina counties,[31] and examiners appointed by the Civil Service Commission have been serving there since November 8, 1965. Examiners have also been assigned to 11 counties in Alabama, five parishes in Louisiana, and 19 counties in Mississippi.[32] The examiners are listing people found eligible to vote, and the challenge procedure has been

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[31] 30 Fed. Reg. 13850.

[32] 30 Fed. Reg. 9970–9971, 10863, 12363, 12654, 13849–13850, 15837; 31 Fed. Reg. 914.

employed extensively.[33] No political subdivision has yet sought to have federal examiners withdrawn through the Attorney General or the District Court for the District of Columbia.

III.

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the *amici curiae* also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4 (a)–(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6 (b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the *amici curiae* maintain that §§ 4 (a) and 5, buttressed by § 14 (b) of the Act, abridge due process by limiting litigation to a distant forum.

Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge

[33] See Commission on Civil Rights, The Voting Rights Act.

no court has ever done so. See *International Shoe Co.* v. *Cocreham*, 246 La. 244, 266, n. 5; cf. *United States* v. *City of Jackson*, 318 F. 2d 1, 8 (C. A. 5th Cir.). Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. See *United States* v. *Brown*, 381 U. S. 437; *Ex parte Garland*, 4 Wall. 333. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486; *Florida* v. *Mellon*, 273 U. S. 12, 18. The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. Cf. our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 258–259, 261–262; and *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304. We turn now to a more detailed description of the standards which govern our review of the Act.

Section 1 of the Fifteenth Amendment declares that "the right of citizens of the United States to vote shall

not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. See *Neal* v. *Delaware*, 103 U. S. 370; *Guinn* v. *United States*, 238 U. S. 347; *Myers* v. *Anderson*, 238 U. S. 368; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 649; *Schnell* v. *Davis*, 336 U. S. 933; *Terry* v. *Adams*, 345 U. S. 461; *United States* v. *Thomas*, 362 U. S. 58; *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Alabama* v. *United States*, 371 U. S. 37; *Louisiana* v. *United States*, 380 U. S. 145. These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington* v. *Rash*, 380 U. S. 89, 91, that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U. S., at 347.

South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that "Congress shall have the power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights

created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia*, 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. For recent examples, see the Civil Rights Act of 1957, which was sustained in *United States* v. *Raines*, 362 U. S. 17; *United States* v. *Thomas*, *supra*; and *Hannah* v. *Larche*, 363 U. S. 420; and the Civil Rights Act of 1960, which was upheld in *Alabama* v. *United States*, *supra*; *Louisiana* v. *United States*, *supra*; and *United States* v. *Mississippi*, 380 U. S. 128. On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. See *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127.

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. *Ex parte Virginia*, 100 U. S., at 345–346.

This language was again employed, nearly 50 years later, with reference to Congress' related authority under § 2 of the Eighteenth Amendment. *James Everard's Breweries* v. *Day*, 265 U. S. 545, 558–559.

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

IV.

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure pre-

scribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung*, 379 U. S. 294, 302–304; *United States* v. *Darby*, 312 U. S. 100, 120–121. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.[34] After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name.[35] This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future.[36] In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See *McGowan* v. *Maryland*, 366 U. S. 420, 427; *Salsburg* v. *Maryland*, 346 U. S. 545, 550–554. The doctrine of the equality of States, invoked by South Carolina, does not bar this

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[34] House Report 9–11; Senate Report 6–9.

[35] House Report 13; Senate Report 52, 55.

[36] House Hearings 27; Senate Hearings 201.

approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle* v. *Smith*, 221 U. S. 559, and cases cited therein.

Coverage formula.

We now consider the related question of whether the specific States and political subdivisions within § 4 (b) of the Act were an appropriate target for the new remedies. South Carolina contends that the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions which have nothing to do with racial discrimination. These arguments, however, are largely beside the point.[37] Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment. Cf. *North American Co.* v. *SEC*, 327 U. S. 686, 710–711; *Assigned Car Cases*, 274 U. S. 564, 582–583.

To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination.[38] Section 4 (b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Caro-

[37] For Congress' defense of the formula, see House Report 13–14; Senate Report 13–14.

[38] House Report 12; Senate Report 9–10.

lina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.[39] All of these areas were appropriately subjected to the new remedies. In identifying past evils, Congress obviously may avail itself of information from any probative source. See *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 252–253; *Katzenbach* v. *McClung*, 379 U. S., at 299–301.

The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment. Compare *United States* v. *Romano*, 382 U. S. 136; *Tot* v. *United States*, 319 U. S. 463.

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[39] Georgia: House Hearings 160–176; Senate Hearings 1182–1184, 1237, 1253, 1300–1301, 1336–1345. North Carolina: Senate Hearings 27–28, 39, 246–248. South Carolina: House Hearings 114–116, 196–201; Senate Hearings 1353–1354.

It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed.[40] At the same time, through §§ 3, 6 (a), and 13 (b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489; *Railway Express Agency* v. *New York*, 336 U. S. 106. There are no States or political subdivisions exempted from coverage under § 4 (b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years. Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to "ordain and establish" inferior federal tribunals. See *Bowles* v. *Willingham*, 321 U. S. 503, 510–512; *Yakus* v. *United States*, 321 U. S. 414, 427–431; *Lockerty* v. *Phillips*, 319 U. S. 182. At the present time, contractual claims against the United States for more than $10,000 must be

[40] House Hearings 75–77; Senate Hearings 241–243.

brought in the Court of Claims, and until 1962, the District of Columbia was the sole venue of suits against federal officers officially residing in the Nation's capital.[41] We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, and the Act is no less reasonable in this respect.

South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than to submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then to refute whatever evidence to the contrary may be adduced by the Federal Government.[42] Section 4 (d) further assures that an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves. See *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5; cf. *SEC* v. *Ralston Purina Co.*, 346 U. S. 119, 126.

The Act bars direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula. We

[41] Regarding claims against the United States, see 28 U. S. C. §§ 1491, 1346 (a) (1964 ed.). Concerning suits against federal officers, see *Stroud* v. *Benson*, 254 F. 2d 448; H. R. Rep. No. 536, 87th Cong., 1st Sess.; S. Rep. No. 1992, 87th Cong., 2d Sess.; 28 U. S. C. § 1391 (e) (1964 ed.); 2 Moore, Federal Practice ¶ 4.29.

[42] House Hearings 92–93; Senate Hearings 26–27.

reject the claim by Alabama as *amicus curiae* that this provision is invalid because it allows the new remedies of the Act to be imposed in an arbitrary way. The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see *United States* v. *California E. Line*, 348 U. S. 351; *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297. In this instance, the findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4 (b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

Suspension of tests.

We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45, that literacy tests and related devices are not in themselves contrary to the Fifteenth Amendment. In that very case, however, the Court went on to say, "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.*, at 53. The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the

purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years.[43] Under these circumstances, the Fifteenth Amendment has clearly been violated. See *Louisiana* v. *United States,* 380 U. S. 145; *Alabama* v. *United States,* 371 U. S. 37; *Schnell* v. *Davis,* 336 U. S. 933.

The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. *Ibid.* Underlying the response was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates.[44] Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.[45] Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many wihtes who had enjoyed the franchise for their entire adult lives.[46]

Review of new rules.

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional

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[43] House Report 11–13; Senate Report 4–5, 9–12.

[44] House Report 15; Senate Report 15–16.

[45] House Report 15; Senate Report 16.

[46] House Hearings 17; Senate Hearings 22–23.

power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *Wilson* v. *New*, 243 U. S. 332. Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal decrees.[47] Congress had reason to suppose that these States might try similar maneuvers in the future, in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

For reasons already stated, there was nothing inappropriate about limiting litigation under this provision to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief. Nor has Congress authorized the District Court to issue advisory opinions, in violation of the principles of Article III invoked by Georgia as *amicus curiae*. The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision wishing to make use of a recent amendment to its voting laws therefore has a concrete and immediate "controversy" with the Federal Government. Cf. *Public Utilities Comm'n* v. *United States*, 355 U. S. 534, 536–539; *United States* v. *California*, 332 U. S. 19, 24–25. An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment.

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[47] House Report 10–11; Senate Report 8, 12.

Federal examiners.

The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. See *Alabama* v. *United States, supra; United States* v. *Thomas,* 362 U. S. 58. In many of the political subdivisions covered by § 4 (b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal decrees.[48] Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. As for the briskness of the challenge procedure, Congress knew that in some of the areas affected, challenges had been persistently employed to harass registered Negroes. It chose to forestall this abuse, at the same time providing alternative ways for removing persons listed through error or fraud.[49] In addition to the judicial challenge procedure, § 7 (d) allows for the removal of names by the examiner himself, and § 11 (c) makes it a crime to obtain a listing through fraud.

In recognition of the fact that there were political subdivisions covered by § 4 (b) of the Act in which the appointment of federal examiners might be unnecessary, Congress assigned the Attorney General the task of determining the localities to which examiners should be sent.[50] There is no warrant for the claim, asserted by Georgia as *amicus curiae,* that the Attorney General is free to use this power in an arbitrary fashion, without re-

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[48] House Report 16; Senate Report 15.

[49] Senate Hearings 200.

[50] House Report 16.

gard for the purposes of the Act. Section 6 (b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of nonwhites to whites, and to weigh evidence of good-faith efforts to avoid possible voting discrimination. At the same time, the special termination procedures of § 13 (a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are clearly not needed. Cf. *Carlson* v. *Landon*, 342 U. S. 524, 542–544; *Mulford* v. *Smith*, 307 U. S. 38, 48–49.

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them.[51] We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteeenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The bill of complaint is

Dismissed.

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[51] See Commission on Civil Rights, The Voting Rights Act.

APPENDIX TO OPINION OF THE COURT.

VOTING RIGHTS ACT OF 1965.

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgment of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local

action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days

after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of

the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few

in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United

States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b) unless a declaratory judgment has been rendered under section 4 (a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4 (b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or

(2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9 (a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U. S. C. 118i), prohibiting partisan political activity: *Provided,* That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9 (b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9 (a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided,* That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to

vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3 (a), to the court.

Sec. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the

United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commision shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure

to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hear-

ing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4 (b) and a declaratory judgment has not been entered under subsection 4 (a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce

any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3 (a), 6, 8, 9, 10, or 12 (e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11 (a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11 (a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibilty to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the

Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3 (a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing pro-

cedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U. S. C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or

parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (42 U. S. C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting

against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

SUPREME COURT OF THE UNITED STATES

No. 22, ORIGINAL.

State of South Carolina, Plaintiff,
v.
Nicholas deB. Katzenbach, Attorney General of the United States.
On Bill of Complaint.

[March 7, 1966.]

MR. JUSTICE BLACK, concurring and dissenting.

I agree with substantially all of the Court's opinion sustaining the power of Congress under § 2 of the Fifteenth Amendment to suspend state literacy tests and similar voting qualifications and to authorize the Attorney General to appoint federal examiners to register qualified voters in various sections of the country. Section 1 of the Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In addition to this unequivocal command to the States and the Federal Government that no citizen shall have his right to vote denied or abridged because of race or color, § 2 of the Amendment unmistakenly gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgment no matter how subtle. Compare my dissenting opinion in *Bell* v. *Maryland*, 378 U. S. 226, 318. I have no doubt whatever as to the power of Congress under § 2 to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used as notorious means to deny and abridge voting rights on racial grounds. This same congressional power necessarily exists to authorize appointment of federal voting registrars. I also agree

with the judgment of the Court upholding § 4 (b) of the Act which sets out a formula for determining when and where the major remedial sections of the Act take effect. I reach this conclusion, however, for a somewhat different reason than that stated by the Court, which is that "the coverage formula is rational in both practice and theory." I do not base my conclusion on the fact that the formula is rational, for it is enough for me that Congress by creating this formula has merely exercised its hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect. By stating in specific detail that the major remedial sections of the Act are to be applied in areas where certain conditions exist, and by granting the Attorney General and the Director of the Census unreviewable power to make the mechanical determination of which areas come within the formula of § 4 (b), I believe that Congress has acted within its established power to set out preconditions upon which the Act is to go into effect. See, *e. g.*, *Martin* v. *Mott*, 12 Wheat. 19; *United States* v. *Bush & Co.*, 310 U. S. 371; *Hirabayashi* v. *United States*, 320 U. S. 81.

Though, as I have said, I agree with most of the Court's conclusions, I dissent from its holding that every part of § 5 of the Act is constitutional. Section 4 (a), to which § 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of § 4 (b). Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. And if by this section Congress has created a case or controversy, and I do not believe it has, then it seems to me that the most appropirate judicial forum for settling these important questions is this Court acting under its original Art. III, § 2 jurisdiction to try cases in which a State is a party.[1] At least a trial in this Court would treat the States with the dignity to which they should be entitled as constituent members of our Federal Union.

The form of words and the manipulation of presumptions used in § 5 to create the illusion of a case or controversy should not be allowed to cloud the effect of that section. By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to

[1] If § 14 (b) of the Act by stating that no court other than the District Court for the District of Columbia shall issue a judgment under § 5 is an attempt to limit the constitutionally created original jurisdiction of this Court, then I think that section is also unconstitutional.

secure precisely the type of advisory opinion our Constitution forbids. As I have pointed out elsewhere, see my dissenting opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 507, n. 6, pp. 513–515, some of those drafting our Constitution wanted to give the federal courts the power to issue advisory opinions and propose new laws to the legislative body. These suggestions were rejected. We should likewise reject any attempt by Congress to flout constitutional limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

(b) My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. As the Court says the limitations of the power granted under § 2 are the same as the limitations imposed on the exercise of any of the powers expressly granted Congress by the Constitution. The classic formulation of these constitutional limitations was stated by Chief Justice Marshall when he said in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional." (Emphasis added.) Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One

of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.[2] Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to

[2] The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies. One of the abuses complained of most bitterly was the King's practice of holding legislative and judicial proceedings in inconvenient and distant places. The signers of the Declaration of Independence protested that the King "has called together legislative bodies at places unusual, uncomfortable, and distance from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures," and they objected to the King's "transporting us beyond the Seas to be tried for pretended offenses." These abuses were fresh in the minds of the Framers of our Constitution and in part caused them to include in Art. 3, § 2 the provision that criminal trials "shall be held in the State where the said crimes shall have been committed." Also included in the Sixth Amendment was the requirement that a defendant in a criminal prosecution be tried by a "jury of the State and district wherein the crime was committed which district shall have been previously ascertained by law."

create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring law suits against state officials once an operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly re-

jected.[3] The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments.[4] Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval.

In this and other prior Acts Congress has quite properly vested the Attorney General with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to

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[3] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of American States (1927), pp. 605, 789, 856.

[4] One speaker expressing what seemed to be the prevailing opinion of the delegates said of the proposal, "Will any State ever agree to be bound hand & foot in this manner. It is worse than making mere corporations of them. . . ." *Id.*, at p. 604.

the States than as an aid to the enforcement of the Act. I would hold § 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens.[5]

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[5] Section 19 of the Act provides as follows:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."